North Dakota Law Review

Volume 66 | Number 4 Article 11

1990

North Dakota Supreme Court Review

North Dakota Law Review Associate Editors

NORTH DAKOTA SUPREME COURT REVIEW

The Supreme Court Review briefly summarizes the important decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to indicate cases of first impression and cases that significantly affect earlier interpretations of North Dakota Law.

The following topics are included in the Review:

ADMINISTRATIVE LAW

CHOUKALOS V. NORTH DAKOTA STATE PERSONNEL BD.

In *Choukalos v. N.D. State Personnel Bd.*,[1] the State Personnel Board and the North Dakota Insurance Commissioner appealed a district court judgment that reversed the board's decision upholding the termination of Richard Choukalos as an employee in the insurance department, ordered his reinstatement, remanded to determine back pay, and awarded Choukalos attorney fees and costs.[2] Choukalos cross-appealed, claiming that the board's findings and conclusions were unsupported.[3]

Following a performance evaluation, the insurance commissioner notified Choukalos that his position in the commissioner's office was to be terminated.[4] He was given a written notice of termination accompanied with the reasons for termination and

1. 429 N.W.2d 441 (N.D. 1988).
2. Choukalos v. N.D. State Personnel Bd., 429 N.W.2d 441, 441 (N.D. 1988).
3. *Choukalos*, 429 N.W.2d at 441.
4. *Id.* at 442.

informed of an opportunity to respond in writing.[5] Choukalos requested a hearing by the State Personnel Board.[6] When the board upheld the termination, Choukalos appealed to the district court.[7] After remanding for preparation of findings, conclusions, and a decision under section 28-32-13 of the North Dakota Century Code, the district court reversed the board's decision and ordered corrective measures.[8] On appeal, the board argued that the findings of fact were supported by a preponderance of the evidence that Choukalos was an unsatisfactory employee, and that attorney fees should not have been ordered when the board was substantially justified.[9]

The North Dakota Supreme Court noted that review of administrative agency decisions was limited.[10] The court must consider whether: 1) the findings of fact are supported by a preponderance of the evidence; 2) the conclusions of law are sustained by the findings of fact; and 3) the agency decision is supported by conclusions of law.[11]

The board found that Choukalos' failures at work were "cause" supporting the termination decision.[12] The supreme court ruled that these findings of fact were supported by the preponderance of the evidence.[13] Furthermore, the court found that the board's decision to sustain the termination was supported by conclusions of law.[14]

The district court had reversed the board when it determined that the board did not comply with portions of the North Dakota Personnel Policies Manual.[15] However, these policies were not raised as issues in the administrative hearing and, thus, were not preserved for review.[16] Choukalos also asserted that the board's

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5. *Id.*
6. *Id.*
7. *Id.*
8. *Id. See* N.D. CENT. CODE § 28-32-13, (1974 and Supp. 1989)(providing that the agency shall make and state concisely its findings of facts and separate conclusions and deliver notice to all parties).
9. *Choukalos*, 429 N.W.2d at 443.
10. *Id. See, e.g., In re* Prettyman, 410 N.W.2d 533, 535-36 (N.D. 1987)(citing Triangle Oilfield Services, Inc. v. Hagen, 373 N.W.2d 413 (N.D. 1985)).
11. *Choukalos*, 429 N.W.2d at 443 (citing Am. State Bank, Etc. v. State Banking Bd., 289 N.W.2d 222, 225-26 (N.D. 1980)).
12. *Choukalos*, 429 N.W.2d at 444. *See* N.D. ADMIN. CODE § 59.5-03-03-05 (1985)(authorizing an "appointing authority, . . . [to] dismiss an employee for cause") and N.D. ADMIN. CODE § 59.5-03-03-02 (1985 and amended 1989)(defining "cause" as "conduct related to the employee's job duties, job performance, or working relationships which is detrimental to the discipline and efficiency of the service . . .").
13. *Choukalos*, 429 N.W.2d at 444.
14. *Id.*
15. *Id.*
16. *Id.* (quoting County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 329

findings and conclusions did not comply with section 28-32-13 of the North Dakota Century Code.[17] However, the supreme court stated that findings are adequate when the reviewing court can understand the basis of the agency's decision as it did in this case.[18] The judgment of the district court was reversed and the board's decision affirmed.[19]

ADMINISTRATIVE LAW AND PROCEDURE

MONTANA-DAKOTA UTIL. V. PUB. SERVICE COMM'N

In *Montana-Dakota Util. v. Pub. Service Comm'n*,[20] both parties appealed a district court judgment that affirmed in part and reversed in part the results of a hearing held by the North Dakota Public Service Commission (PSC) in response to a rate request by Montana-Dakota Utilities Company (MDU).[21] The PSC appealed the reversal of disallowance of part of MDU's expenditures for coal that had been purchased from its subsidiary, the Knife River Coal Mining Company (Knife River).[22] MDU cross-appealed from the affirmation of "PSC's restatement of MDU's unamortized investment-tax-credit balance."[23]

The North Dakota Supreme Court determined that the PSC acted within its authority when it determined that Knife River made an unreasonable profit in selling coal to MDU.[24] The PSC is authorized under section 49-02-02(6) of the North Dakota Century Code to disallow or reduce purchasing expenditures by a public

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(N.D. 1985)("[o]n appeal from an administrative agency decision, the general rule is that the reviewing court will confine its review to those issues which were raised before the agency")).

17. *Choukalos*, 429 N.W.2d at 44. *See* N.D. CENT. CODE § 28-32-13. For a description of § 28-32-13, see *supra* note 8.

18. *Choukalos*, 429 N.W.2d at 444 (quoting Hystad v. Indust. Comm'n, 389 N.W.2d 590, 597 (N.D. 1986)("The findings of an administrative agency are adequate when they enable the reviewing court to understand the basis of the agency's decision")). Also, giving Choukalos only the first page of the board's findings instead of an entire copy did not render the findings of fact and conclusions of law legally insufficient. *Choukalos*, 429 N.W.2d at 444.

19. *Choukalos*, 429 N.W.2d at 444.

20. 431 N.W.2d 276 (N.D. 1988).

21. Montana-Dakota Util. v. Pub. Serv. Comm'n, 431 N.W.2d 276, 278 (N.D. 1988). MDU's initial application to the PSC requested $11,097,000 in additional revenue. *Id.* The request was reduced to $8,343,000, and the PSC authorized a rate yielding additional annual revenue of $4,378,000. *Id.*

22. *Montana-Dakota Util.*, 431 N.W.2d at 278.

23. *Id.*

24. *Id.* Subsequently, the PSC reduced MDU's fuel expenditures by $686,000 and coal stocks by $77,000. *Id.*

utility if the subsidiary made unreasonable profits from the sale.[25]

The PSC used a rate-of-return analysis to determine that excessive profits had accrued.[26] MDU argued that a "price" test based on fair market value should be used.[27] However, the court noted that there were no grounds for limiting the PSC's methodology under section 49-02-02(6) or in case law.[28] Also, other jurisdictions have similarly concluded that regulatory commissions may select their methods as long as the results are not unjust or arbitrary.[29] In this case, the PSC determined that a rate-of-return analysis was more appropriate than a price test because of the lack of competition.[30]

MDU further asserted that deriving a reasonable rate-of-return figure from a cash-flow model was incorrect because it compared unregulated to regulated businesses.[31] However, the North Dakota Supreme Court noted that in such a technical area an administrative agency's expert judgment is entitled to great deference.[32]

In response to MDU's cross-appeal, the court determined that PSC's restatement of MDU's unamortized investment-tax-credit balance to reflect a 26-year period, rather than the 20-year period

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25. *Id.* *See* N.D. CENT. CODE § 49-02-02(6) (1978 and Supp. 1989). Section 49-02-02(6) provides:

> 49-02-02. Powers of public service commission with reference to public utilities. The commission shall have power to:
> * * * * * * * * * * * *
> 6. Require, in its discretion, proof that no unreasonable profit is made in the sale of material to or services supplied for any public utility by any firm or corporation owned or controlled directly or indirectly by the public utility or any affiliate, subsidiary, parent company, associate, or any corporation whose controlling stockholders are also controlling stockholders of the public utility, before permitting the value of said materials or services to be included in valuations or cost of operations for ratemaking purposes. If unreasonable profits have been made in any such transactions, valuations of said materials and services may be reduced accordingly.

Id.

26. *Montana-Dakota Util.*, 431 N.W.2d at 278. The PSC agreed with the analysis of an expert witness that the rate of return was excessive. *Id.*

27. *Id.* MDU asserted that the court's decision in Application of Montana-Dakota Util. Co., 102 N.W.2d 329 (N.D. 1960), mandated the use of a "price" test. *Montana-Dakota Util.*, 431 N.W.2d at 278.

28. *Montana-Dakota Util*, 431 N.W.2d at 279. (For the text of the N.D. CENT. CODE § 49-02-02(6) see *supra* note 6.)

29. *Montana-Dakota Util.*, 431 N.W.2d at 279 (citing Montana-Dakota Util. Co. v. Montana Dep't of Pub. Serv. Regulation 752 P.2d 155 (Mont. 1988); Application of Montana-Dakota Utilities Co., 278 N.W.2d 189 (S.D. 1979)(allowing a rate-of-return analysis where a subsidiary has made unreasonable profits selling materials to the regulated business)).

30. *Montana-Dakota Util.*, 431 N.W.2d at 279-80.

31. *Id.* at 280. PSC compared Knife River's rate of return with a reasonable rate-of-return which an expert derived from a discounted cash-flow model instead of using the actual rate of return. *Id.*

32. *Id.* (citing Montana-Dakota Util. Co. v. PSC, 413 N.W.2d 308 (N.D. 1987)).

which had been elected, was incorrect.[33] If rates are unreasonable, the PSC can only compensate by establishing new future rates.[34] The reinstatement of the unamortized investment-tax-credit to reflect amortization over 26 years constituted retroactive ratemaking.[35] The PSC can only adjust the amortization schedule on MDU's remaining unamortized balance.[36] Both the appeal and cross-appeal were reversed and remanded.[37]

APPEAL AND ERROR

CLUB BROADWAY, INC. V. BROADWAY PARK

In *Club Broadway, Inc. v. Broadway Park*,[38] a North Dakota Civil Procedure Rule 54(b) certification was held to be granted improvidently by the trial court in an action for fraud, conversion and interference with contractual relations.[39]

Mark Kiefer, sole officer, director, and shareholder of Club Broadway, Inc. sued Broadway Park, a limited partnership which owned the buildings in which Club Broadway was located, its officers and directors, and also sued former employees of Club Broadway.[40] Kiefer and Club Broadway, Inc. contended that the defendants obtained Club Broadway property through fraud, deceit, converted membership lists and interfered with Club Broadway's customers.[41] They also contended that the Defendant's Broadway Park, which now operates a health club, interfered with Club Broadway's contracts with its employees.[42]

Two of the officers of Broadway Park Limited Partnership, Calvin Fercho and Scott Fridlund, were granted a summary judgment and dismissed from the action by the trial court.[43] Kiefer and Club Broadway, Inc. sought a Rule 54(b) certification of the summary judgment so they could appeal the dismissal of Fercho and Fridlund instead of waiting until after the trial of the other

33. *Montana-Dakota Util.*, 431 N.W.2d at 280.
34. *Id.* (citing N.D. CENT. CODE § 49-02-03 (1978); Quad County Community Action Agency v. Elkin, 315 N.W.2d 665 (N.D. 1982)).
35. *Montana-Dakota Util.*, 431 N.W.2d at 280. In making the adjustment, the PSC increased the unamortized balance by $432,000 and reduced its current rate base by the same amount. *Id.*
36. *Id.* at 281.
37. *Id.*
38. 443 N.W.2d 919 (N.D. 1989).
39. Club Broadway, Inc. v. Broadway Park, 443 N.W.2d 919, 920 (N.D. 1989).
40. *Club Broadway, Inc.*, 443 N.W.2d at 920.
41. *Id.*
42. *Id.*
43. *Id.*

defendants.[44] The trial court agreed and granted the Rule 54(b) certification, stating that a Rule 54(b) certification would prevent duplicate discovery and a second trial.[45] Kiefer and Club Broadway, Inc., appealed the summary judgment to the North Dakota Supreme Court.[46] Fercho and Fridlund cross-appealed and argued that the trial court, in granting the Rule 54(b) certification, abused the court's discretion.[47]

The supreme court noted that in *Peterson v. Zerr*[48] it ruled that Rule 54(b) certifications should be used in the "infrequent harsh case."[49] The court stated that since anyone could contend that a second trial may be required if a district court is reversed on issues decided on summary judgment, more was needed and that in itself is not a sufficient reason.[50]

The court determined that in *Club Broadway, Inc.* most of the adjudicated claims against Fercho and Fridlund were related to the unadjudicated claims pending against the remaining defendants.[51] Additionally, the court noted that since the alleged conduct was so interrelated, the court would be required to review the same or similar factual situations in subsequent appeals after the lower court made a decision with regard to the remaining defendants.[52]

The supreme court concluded that there were no facts present making this an "infrequent harsh case" requiring a Rule 54(b) certification.[53] Therefore, the supreme court determined the trial court abused its discretion in granting the Rule 54(b) certification and dismissed the appeal.[54]

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44. *Id.* *See* N.D.R. CIV. P. 54(b) (judgment involving multiple parties).

45. *Club Broadway, Inc.*, 443 N.W.2d at 921. The trial court stated that because the judgment was a summary judgment that needed to be certified, if the North Dakota Supreme Court would review it and find the summary judgment not appropriate, a second trial would be necessary, since issues involving those defendants were different than those in the first trial. *Id.*

46. *Id.* at 920.

47. *Id.* at 921.

48. 443 N.W.2d 293 (N.D. 1989).

49. *Club Broadway, Inc.*, 443 N.W.2d at 921 (citing Peterson v. Zerr, 443 N.W.2d 293 (N.D. 1989)).

50. *Id.*

51. *Id.* at 922.

52. *Id.*

53. *Id.*

54. *Club Broadway, Inc.*, 443 N.W.2d at 922. Justice Meschke dissented, just as he had in *Peterson v. Zerr*. *Id.* (Meschke, J., dissenting). He contended that the majority reviewed the trial court's reasons individually, instead of reviewing them as a whole. *Id.* at 923. The dissent emphasized the certainty needed in Rule 54(b) situations and stated that it was designed for certainty and clarity. *Id.* The dissent concluded that the majority had destroyed the certainty by limiting Rule 54(b). *Id.*

ARBITRATIONS AND AWARD

BACKES V. BYRON

In *Backes v. Byron*,[55] the State Highway Commissioner appealed a district court order denying the North Dakota State Highway Department's motion for a preliminary injunction against a construction company.[56] The North Dakota Supreme Court held that the appeal was moot.[57]

Byron's Construction was awarded a $2.3 million contract from the North Dakota State Highway Department to rebuild a segment of state highway.[58] The Highway Department accepted the reconstruction project after it had been finished by Byron's Construction.[59] The company filed a claim for an equitable adjustment based on total costs incurred by Byron's Construction during the reconstruction project.[60] The North Dakota Highway Department denied the claim for equitable relief submitted by Byron's Construction.[61]

Byron's Construction filed a demand on the Highway Department for arbitration of all the claims and controversies.[62] The arbitrators issued a decision dismissing all the claims against the Highway Department, and this decision was confirmed by the district court.[63] Byron's Construction served a second demand for arbitration on the Highway Department and asked the district court to appoint arbitrators.[64] The Highway Department answered with a motion seeking a preliminary injunction staying the second arbitration.[65]

The district court denied the Highway Department's motion, concluding that there were issues of fact for the second arbitration panel to determine.[66] The North Dakota Highway Department appealed the denial of the motion for a preliminary injunction.[67]

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55. 443 N.W.2d 621 (N.D. 1989).
56. Backes v. Byron, 443 N.W.2d 621, 622 (N.D. 1989).
57. *Backes*, 443 N.W.2d at 622.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Backes*, 443 N.W.2d at 623. *See* N.D. CENT. CODE § 24-02-27 (1987)(a party desiring arbitration shall submit a written demand on the other party).
63. *Id.* The district court's confirmation of the arbitrator's decision was also appealed to the North Dakota Supreme Court. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Backes*, 443 N.W.2d at 621. The Highway Department raised the single issue on appeal of whether the district court properly refused to issue the preliminary instruction. *Id.*

The North Dakota Supreme Court concluded that the Highway Department's appeal became moot as a second arbitration hearing had already been held and a decision rendered.[68] Therefore, the appeal was dismissed.[69]

ARREST

STATE V. ZEARLEY

In *State v. Zearley*,[70] it was held that the reasonableness of a pocket search must be ascertained separately from the circumstances surrounding an accompanying patdown search.[71]

Drug Enforcement agents searched the Metzner home for drugs pursuant to a no-knock search warrant.[72] The agents encountered Jeff Zearley at the home and conducted a patdown search of Zearley followed by a pocket search.[73] A drug pipe and packets of methamphetamine were found as a result of the search.[74] The agent who conducted the search later testified that he thought that the pipe was a knife.[75]

The trial court ruled that the evidence was inadmissible because there was no basis for searching the defendant and held that the search violated the North Dakota Constitution on reasonable searches and seizures.[76]

The state appealed, asserting that the patdown was a reasonable search for weapons and the pocket search was reasonable to determine whether the object felt by the agent in the patdown search was a weapon.[77]

The North Dakota Supreme Court, citing past case law rejecting the concept that an officer executing a search warrant could also frisk all persons present for weapons, noted that a patdown search could be conducted if there was a valid concern for safety.[78]

The court found that the agent's patdown of Zearley was justi-

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68. *Id.*

69. *Id.* The court noted that if the case was of great public interest and the merits of controversy so unsettled, a determination of the issue would be rendered. *Id.* However, the issues involved in this case were not of that degree of importance. *Id.*

70. 444 N.W.2d 353 (N.D. 1989).

71. State v. Zearley, 444 N.W.2d 353, 359 (N.D. 1989).

72. *Zearley*, 444 N.W.2d at 354.

73. *Id.* at 355.

74. *Id.*

75. *Id.*

76. *Zearley*, 444 N.W.2d at 355. *See* U.S. CONST. amend IV and N.D. CONST. art. I, § 8.

77. *Id.* at 355.

78. *Id. See* State v. Grant, 361 N.W.2d 243 (N.D. 1985)(person searched when owner's home was searched with warrant).

fiable.[79] The patdown was a valid search for safety reasons.[80] The court stated that while the patdown may be reasonable for safety reasons, the pocket search is distinct, and must also be reasonable.[81] The supreme court concluded that the patdown was reasonable, but could not ascertain from the record whether the pocket search was reasonable.[82]

The supreme court held that where a patdown search reveals an object which could reasonably be a weapon, a pocket search is reasonable to determine if in fact the object is a weapon.[83] The North Dakota Supreme Court reversed the trial court's ruling that the patdown of Zearley was unreasonable and remanded the case to determine whether the agent had reasonable grounds to conduct a pocket search.[84]

ATTORNEY & CLIENT

DISCIPLINARY BD. OF SUPREME CT. V. DISSELHORST

In *Disciplinary Bd. of Supreme Ct. v. Disselhorst*,[85] Thomas M. Disselhorst, a Bismarck attorney, received a public reprimand for failing to attend to bankruptcy and child custody matters and failing to communicate with his client.[86]

Disselhorst represented Kevin Brown in divorce proceedings, accepted partial payment regarding a bankruptcy in 1985, and agreed to represent him in a child custody matter in March of 1986.[87] Brown had moved to Texas in 1986, and Brown's parents acted on his behalf regarding legal matters with Disselhorst.[88]

On April 25, 1986, after attempts to contact Disselhorst by phone, Brown's mother went to Disselhorst's office and gave him a check for $200 for the child custody matter and the bankruptcy.[89] As a result of Disselhorst's lack of progress on these matters, Brown's parents tried to contact Disselhorst repeatedly, and Disselhorst failed to respond to any attempt to contact him.[90]

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79. *Zearley*, 444 N.W.2d at 356.
80. *Id.* at 357.
81. *Id.*
82. *Zearley*, 444 N.W.2d at 359.
83. *Id.* at 358 (citing People v. Thurman, 209 Cal. App. 3d 817, __, 257 Cal. Rptr. 417, 521 (1989)).
84. *Zearley*, 444 N.W.2d at 359.
85. 444 N.W.2d 334 (N.D. 1989).
86. Disciplinary Bd. of Supreme Ct. v. Disselhorst, 444 N.W.2d 334, 338 (N.D. 1989).
87. *Disselhorst*, 444 N.W.2d at 335.
88. *Id.*
89. *Id.*
90. *Id.* Disselhorst did not respond to the messages left on his answering machine and did not answer a certified letter. *Id.*

Brown retained another attorney in July of 1986 and dismissed Disselhorst in September of 1986.[91] After repeated requests for the documents from Brown's divorce proceeding, Disselhorst finally sent the Browns the documents in January of 1987.[92] Disselhorst also returned $600 that had previously been paid.[93]

A Hearing Panel of the Disciplinary Board found that Disselhorst violated the Code of Professional Responsibility by: engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; neglecting legal matters; and intentionally failing to seek the lawful objective of his client and failing to carry out a contract of employment.[94] The hearing panel recommended that Disselhorst be publicly reprimanded.[95]

Before the North Dakota Supreme Court, Disselhorst took exception to some of the findings and the public reprimand and contended that his health problems mitigated his conduct to some extent.[96]

In reviewing the hearing panel's recommendation, the North Dakota Supreme Court found that although Disselhorst's conduct was attributable to health problems, they did not justify Disselhorst's failure to tend to the matters entrusted to him by Brown.[97] The court also held that Disselhorst's conduct was negligent enough to warrant a public reprimand.[98]

However, the supreme court determined that although Disselhorst's conduct was negligent it was not intentional, thus not violative of Canon 7, DR 7-101(A)(1), (2), (3) of the Code of Professional Responsibility.[99] The court additionally found no evidence that Disselhorst intentionally misled or deceived his clients.[100]

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91. *Id.*

92. *Disselhorst*, 444 N.W.2d at 336.

93. *Id.* Disselhorst paid $400 in April of 1988, and $200 in May of 1988 and promised to pay interest on the $600 in the amount of $151.20. *Id.*

94. *Id. See* N.D. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (deeds of misconduct); DR 6-101(A)(3) (neglect of legal matters): and DR 7-101(A)(1), (2), (3) (intentional misconduct).

95. *Disselhorst*, 444 N.W.2d at 336.

96. *Id.* at 336-37. Disselhorst was diagnosed as having hypothyroidism in 1987. *Id.* at 337. A letter from Disselhorst's doctor in evidence indicated that Disselhorst could have suffered from symptoms that would have affected his intellectual functions and personality. *Id.* Disselhorst contended that he suffered from hypothyroidism prior to diagnosis, although he had no evidence of his prior condition. *Id.*

97. *Id.* at 337-38. The supreme court reviews disciplinary proceedings against an attorney *de novo* on the record. *Id.* at 335.

98. *Id.* at 338.

99. *Id.*

100. *Disselhorst*, 444 N.W.2d at 338. Justice VandeWalle concurred specially, noting that the panel indicated that "health problems . . . were mitigating circumstances in the misconduct." *Id.* The concurrence stated that the supreme court should have been

DISCIPLINARY BD. OF SUPREME CT. V. PETERSON

In *Disciplinary Bd. of Supreme Ct. v. Peterson*,[101] an attorney's actions warranted a public reprimand, suspension for one year and before reinstatement, a successful completion of the ethics portion of the bar examination.[102] A hearing panel of the Disciplinary Board of the Supreme Court recommended the sanctions, and Peterson appealed to the North Dakota Supreme Court, contending that he was denied due process.[103]

Peterson's first contention was that he was denied due process when his request for a continuance was denied.[104] The continuance was filed the Friday before a hearing set for Monday, April 28, 1988.[105] The brief in support of the motion for a continuance elaborated on medical problems suffered by both Peterson and his attorney.[106] The court noted that although it was known then about Peterson's attorney's serious illness, the extent of the seriousness of the illness was not known to the hearing panel.[107]

The supreme court found that although a continuance will be granted if supported by a plausible medical reason, Peterson's request was not supported by a physician's letter or any such plausible medical reason.[108] Additionally, the supreme court determined that the hearing panel did not err in not granting a continuance because by appearing at the hearing Peterson waived any objection to the denial.[109]

Peterson's second argument was that the complainant's absence at the hearing constituted a denial of due process.[110] The complainant's deposition was admitted instead which Peterson argued was a denial of due process.[111] Finding no error, the court determined that the deposition was properly admitted since the attendance of a Minnesota resident could not be compelled by the

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informed whether or not the Panel would have recommended a stronger discipline if Disselhorst had not had mitigating health problems. *Id.*

101. 446 N.W.2d 254 (N.D. 1989).

102. Disciplinary Bd. of Supreme Ct. v. Peterson, 446 N.W.2d 254, 257 (N.D. 1989).

103. *Peterson*, 446 N.W.2d at 255.

104. *Id.*

105. *Id.* The grounds on which the motion for continuance were as follows: 1) medical reasons, 2) time constraints of the counsel; and 3) a new matter had arisen since the setting of the hearing date. *Id.*

106. *Id.*

107. *Id.*

108. *Peterson*, 446 N.W.2d at 255. *See* Disciplinary Bd. of Supreme Ct. v. Ellis, 418 N.W.2d 788 (N.D. 1989)(supreme court granted continuance when presented by plausible medical reason).

109. *Peterson*, 446 N.W.2d at 255.

110. *Id.*

111. *Id.*

hearing panel and Peterson's attorney cross-examined the complainant at the deposition.[112]

Finally, Peterson argued that he was denied due process because a witness subpoenaed by the hearing panel failed to appear.[113] The court found that this argument was without merit because a party contending deprivation of the right to examine a witness may not rely on the fact that an adverse party subpoenaed the witness.[114]

The supreme court found clear and convincing evidence that Peterson never filed an action for which he accepted a fee; that he entered into business transactions with a client without full disclosure; that he commingled a client's funds with his own; that he kept incomplete records of the client's properties and funds; and that Peterson failed to account for an unknown number of valuable coins entrusted to him by the client.[115]

The supreme court, therefore, agreed with the hearing panel's findings of violations of the Code of Professional Responsibility and ordered that Peterson be publicly reprimanded, suspended for one year, and before reinstatement, be required to successfully complete the ethics portion of the bar examination.[116]

MCADAM V. DYNES

In *McAdam v. Dynes*,[117] the North Dakota Supreme Court determined that an oral agreement over attorney fees between a lawyer and his client must be proved by the testimony of the parties and that summary judgment was inappropriate to decide dis-

112. *Id.* at 256. Peterson contended that he was denied due process because his attorney was not present at the hearing. *Id.* The court did not agree, finding that Peterson had the opportunity to be represented and that Peterson in fact did present evidence by testifying and introducing exhibits. *Id.*

113. *Peterson*, 446 N.W.2d at 256.

114. *Id.* (citing Great Plains Supply Co. v. Erickson, 398 N.W.2d 732 (N.D. 1986)). Peterson argued also that he was denied due process because his attorney failed to file a brief, but the court did not consider this contention because Peterson furnished no authority or argument in support. *Peterson*, 446 N.W.2d at 256.

115. *Id.* at 257. *See* N.D. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (lawyer shall not engage in fraudulent conduct); DR 5-104(A) (business transactions are prohibited with client if differing interests); DR 6-101(A)(3) (lawyer shall not neglect a matter); DR-7-101(A)(2) (lawyer shall not fail to carry out a contract); DR 9-102 (depositing of client funds and maintaining complete records of client funds).

116. *Peterson*, 446 N.W.2d at 257. Justice VandeWalle dissented, arguing that unless a procedure requiring a certificate of a physician in order to be granted a continuance on medical grounds was adopted, Peterson's motion for a continuance should have been granted. *Id.* at 259 (VandeWalle, J., dissenting). The dissent found that Peterson's motion was not frivolous. *Id.* Additionally, the dissent noted that as a result of Peterson's attorney's illness he had died. *Id.* The dissent found that Peterson was denied due process. *Id.*

117. 442 N.W.2d 914 (N.D. 1989).

puted facts as to the contract terms.[118]

George T. Dynes, an attorney, represented Toby McAdam in a claim against West River Management for wrongful discharge under the Fair Labor Standards Act.[119] There was no written fee agreement between Dynes and McAdam.[120] Eventually, McAdam and West River Management settled for $15,800.00.[121]

Dynes received the settlement in two checks and kept $11,800.00 of it for attorney's fees and out-of-pocket expenses.[122] McAdam signed the release forms sent by Dynes and endorsed the checks, receiving a total of $4,000.00.[123]

McAdam sued Dynes in small claims court, contending that he believed Dynes represented him on a contingency fee basis.[124] Dynes removed the case to county court and moved for summary judgment.[125] The county court granted the motion, determining that when McAdam signed the release forms and the settlement was divided between McAdam and Dynes, the contract was complete.[126]

The North Dakota Supreme Court found that an oral agreement must be proved by the testimony of the parties.[127] The court noted that the confidential nature of the attorney-client relationship compelled the court to place attorney-client fee agreements under close scrutiny.[128] The court found a genuine issue of material fact to exist as to what the terms of the agreement were and reversed the summary judgment and remanded.[129]

SHARK V. CITY OF FARGO

In *Shark v. City of Fargo*,[130] an attorney was limited to fees only for the amount appropriated by the city for his services.[131] Myer Shark was retained by the City of Fargo to represent the city

118. McAdam v. Dynes, 442 N.W.2d 914, 916 (N.D. 1989).
119. *McAdam*, 442 N.W.2d at 914.
120. *Id.*
121. *Id.*
122. *Id.* at 914-15.
123. *Id.* at 915.
124. *McAdam*, 442 N.W.2d at 915. Although he agreed to the settlement, McAdam argued that he did not agree to attorney's fees. *Id.*
125. *Id.*
126. *Id.* The county court was not willing to undo the completed contract one year later. *Id.*
127. *Id.* at 916.
128. *Id.* The court noted that the attorney has the burden of showing the fairness of the agreement. *Id.*
129. *McAdam*, 442 N.W.2d at 916.
130. 442 N.W.2d 903 (N.D. 1989).
131. Shark v. City of Fargo, 442 N.W.2d 903, 904 (N.D. 1989).

in litigation before the Public Service Commission regarding the natural gas rates charged by Northern States Power.[132] As the litigation progressed, the Fargo City Commission appropriated amounts to Shark to cover his services.[133] In his final request before appeal, Shark asked for an additional $10,000.[134] The Fargo City Commission did not have the money and only appropriated $2,500.[135]

Shark continued to work on the case even after he exhausted the appropriated funds.[136] Shark brought suit to recover the excess fees and the City of Fargo responded, contending that they had an understanding as to the limitations on Shark's fees.[137]

The trial court granted the City of Fargo's motion for summary judgment, ordering the city to pay Shark all the money it had appropriated, and Shark appealed.[138] Shark contended in his appeal that the city should have plead the "defense of automatic termination of the retainer" and he argued that a genuine issue of material fact existed to preclude a summary judgment.[139]

The North Dakota Supreme Court began its discussion by noting that in Rule 8(c) of the North Dakota Rules of Procedure, an affirmative defense should be set forth by the defendant in the answer.[140] The court found the city to have adequately set forth the defense of automatic termination of the retainer in its answer.[141]

The court observed that at the meeting where the city commissioners made the final appropriation to Shark, the city stated this to be the final allocation.[142] Additionally, Shark acknowledged the final appropriation in a letter to the Fargo City Commissioners.[143] Thus, the court did not find that a genuine issue of material

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132. *Shark*, 442 N.W.2d at 904.

133. *Id.* Shark, on behalf of the City of Fargo, prevailed before the Public Service Commission and before the district court. *Id.*

134. *Id.* Shark had been appropriated $15,000 previously by the city. *Id.*

135. *Id.*

136. *Id.* In a letter to the commission, Shark stated he could not have "conscientously [sic] said we had done all possible in this effort" if he had not continued the work. *Id.* at 907 n.6.

137. *Shark*, 442 N.W.2d at 905. $16,370 had been paid to Shark by the city. *Id.* at 904. The City of Fargo made an offer of judgment of $1,300, which was the difference of the total appropriation and the money already paid by Fargo. *Id.* at 905.

138. *Id.* The City of Fargo was ordered to pay the remaining $1,300 from the appropriation. *Id.*

139. *Id.*

140. *Id.* at 906.

141. *Id.*

142. *Shark*, 442 N.W.2d at 906.

143. *Id.* at 907.

fact existed regarding the finality of the appropriation to Shark.[144]

The supreme court held that the trial court's granting of a summary judgment was appropriate and affirmed the judgment.[145]

BANKS AND BANKING

FIRST NAT'L BANK AND TRUST CO. V. JACOBSEN

In *First Nat'l Bank and Trust Co. v. Jacobsen*,[146] guarantors Revold and Phyllis Jacobsen appealed a district court summary judgment which held them "jointly and severally liable to First National Bank & Trust Company of Williston (The Bank) for $599,350.95 plus interest, costs and disbursements."[147]

Revold, both personally and as stockholder and director of two corporations, borrowed money over several years from the Bank.[148] Revold and Phyllis personally guaranteed payment of the corporation notes, and Phyllis personally guaranteed payment of Revold's note.[149]

When all the notes were in default, Revold sold the mineral interests and the proceeds were applied to his personal indebtedness.[150] The trial court granted summary judgment for the Bank and held the Jacobsens liable for the remaining notes and guarantees.[151]

An appeal from a summary judgment requires determining "whether the information provided to the trial court, and viewed in a light most favorable to the opposing party, precludes the existence of a genuine issue of material fact and entitles the moving party to summary judgment as a matter of law."[152] The Bank provided a brief, depositions of the Jacobsens, documentary evidence, and affidavits from Bank officials.[153] The Jacobsens opposed the summary judgment motion with a brief and personal affidavits.[154]

144. *Id.* *See* N.D.R. CIV. P. 56 (summary judgment should be granted only when no genuine issues of material fact exist).

145. *Id.*

146. 431 N.W.2d 284 (N.D. 1988).

147. First Nat'l Bank & Trust Co. v. Jacobsen, 431 N.W.2d 284, 285 (N.D. 1988).

148. *Jacobsen*, 431 N.W.2d at 285.

149. *Id.* One of the personal notes was also secured by a mortgage of mineral interests owned by Revold. The notes were periodically renewed with no reduction in principal having occurred.

150. *Jacobsen*, 431 N.W.2d at 285.

151. *Id.*

152. *Id.* (citing Binstock v. Tschider, 374 N.W.2d 81 (N.D. 1985)). The movant must establish that no genuine issue of material fact exists. N.D.R. CIV. P. 56.

153. *Jacobsen*, 431 N.W.2d at 285.

154. *Id.* at 286.

Phyllis' affidavits asserted that the guarantees were not explained, that she did not read or understand them, that she received no benefit from signing, and that she signed only as a "loyal wife."[155] Revold's affidavit asserted that he did not benefit from the corporation loans, that the Bank should have secured additional guarantees, that Revold's interests were not protected, and that his mineral interests were sold below their fair market value.[156]

On appeal, the Jacobsens contended that their indebtedness was cancelled by accord and satisfaction or by estoppel.[157] Moreover, they assert that genuine issues of material fact existed regarding whether Revold's liability on the personal note secured by the mineral interests ceased due to North Dakota's anti-deficiency statutes, whether the Bank failed to satisfy a condition precedent by not getting additional guarantees from all parties with corporate responsibilities, whether the Bank misrepresented the merits of Revold's investments, whether the Bank breached its fiduciary duty, and whether there was consideration for Phyllis' guarantees.[158]

The supreme court noted that a defense raised in an affidavit opposing summary judgment, but not pleaded in the answer, could not be reviewed on appeal unless the answer had been amended to include the new defense.[159] "Accord and satisfaction, estoppel, failure of a condition precedent, misrepresentation and breach of a fiduciary duty" all constitute " 'an avoidance or affirmative defense' " and should have been pleaded in the Jacobsens' answer or an amended answer.[160] The issue of anti-deficiency statutes was not raised in the district court, hence, as a new issue could not be raised on appeal.[161]

The Jacobsens further asserted they pleaded "waiver" in their answer, and that an issue of material fact about accord and satisfac-

155. *Id.*

156. *Id.*

157. *Jacobsen*, 431 N.W.2d at 286.

158. *Id.* Revold's affidavit claimed that his mineral interests was valued at $650,000 when mortgaged but sold for $56,617.82. *Id. See* N.D. CENT. CODE §§ 32-19-04, 32-19-05, 32-10-06 (1976 and Supp. 1989)(anti-deficiency statutes).

159. *Jacobsen*, 431 N.W.2d at 286. *See* Northwestern Federal Savings & Loan Ass'n of Fargo v. Biby, 418 N.W.2d 786 (N.D. 1988)(a defense not pleaded in the answer could not be reviewed on appeal).

160. *Jacobsen*, 431 N.W.2d at 287. *See* N.D.R. CIV. P. 8(c) (matters constituting an avoidance or affirmative defense).

161. *Jacobsen*, 431 N.W.2d at 287 (citing Spier v. Power Concrete Inc., 304 N.W.2d 68 (N.D. 1981)). *See also id.* (quoting Kilzer v. Binstock, 339 N.W.2d 569, 572 (N.D. 1983), citing Rummel v. Rummel, 265 N.W.2d 230, 231 (N.D. 1978)). The fact that the Jacobsens were represented on appeal by different counsel did not allow them to raise any new issues. *Id.*

tion regarding the sale of the mineral interests should be allowed because the facts supporting both were the same.[162] The court, however, noted that the Jacobsens asserted waiver only in the court brief and Revold's affidavit and did not connect their factual assertions to the affirmative defense of waiver pleaded in their answer.[163]

In respect to the Jacobsens' argument that there was not consideration for their guarantees, the court noted that not only did the Jacobsens' written guarantees create a presumption of consideration, but that evidence established that the Jacobsens received a benefit and the Bank a detriment.[164]

The district court did not err in granting the Bank's motion for summary judgment.[165] The Jacobsens may not raise new issues on appeal and their remedy was to seek relief under rule 60(b) of the North Dakota Rules of Civil Procedure.[166]

SCHIELE V. FIRST NATIONAL BANK OF LINTON

In *Schiele v. First National Bank of Linton*,[167] Edward and Alice Schiele appealed a district court judgment in which a jury established the "fair value" of their residential property.[168] The Schieles had borrowed $135,000 from the First National Bank in Linton securing the promissory note with a real estate mortgage on their home and an assignment of their interest as mortgagees in a farm mortgage.[169] The Schieles defaulted.[170] First National foreclosed and bid $75,000 for the home at the foreclosure sale.[171]

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162. *Jacobsen*, 431 N.W.2d at 287. Support for the Jacobsens' contention may be found in Farmers Union Oil Co. v. Maxiner, 376 N.W.2d 43, 47 (N.D. 1985)(a new issue was raised during the appeal that had been based on the same facts as an issue raised in the lower court).

163. *Jacobsen*, 431 N.W.2d at 288. Factual assertions in a brief do not raise a genuine issue of material fact. *Id.* (citing Northwestern Equipment, Inc. v. Badinger, 403 N.W.2d 8, 10 (N.D. 1987)). Because they did not explain the significance of the evidence, they failed to raise a genuine issue of material fact. *Id.*

164. *Jacobsen*, 431 N.W.2d at 288. *See* N.D. CENT. CODE § 9-05-10 (1987)(providing "[a] written instrument is presumptive evidence of a consideration").

165. *Jacobsen*, 431 N.W.2d at 288-89.

166. *Id.* at 289. *See* N.D.R. CIV. P. 60(b) (1974)(providing relief from judgment or order). Justice Meschke noted that N.D.R. Civ. P. 56(c) does not demand that affidavits correspond to the pleadings. Justice Meschke noted that N.D.R. Civ. P. 15 encourages a liberal policy of amended pleadings and suggested that issues obviously raised in affidavits should be recognized without the formality of a motion to amend. He quoted 6 Moore's Federal Practice, § 56.11[3] as support for his position: " 'Affidavits going beyond the pleadings may be considered if facts appear in the affidavits which would justify an amendment.' " *Jacobsen*, 431 N.W.2d at 289 (Meschke, J., concurring and dissenting).

167. 436 N.W.2d 248 (N.D., 1989).

168. Schiele v. First Nat'l Bank of Linton, 436 N.W.2d 248, 248 (N.D. 1989).

169. *Schiele*, 436 N.W.2d at 248.

170. *Id.*

171. *Id.*

The Schieles then contended that their debt was satisfied and requested that the trial court order return of the farm mortgage.[172] The trial court, however, granted summary judgment to First National, and the Schieles appealed.[173]

In that appeal, the supreme court held that First National was entitled to foreclose on the farm mortgage collateral to satisfy the remaining debt, but that the fair value of the home had to be determined by a jury in order to compute the remaining debt.[174] On remand, the trial court defined "fair value" in its jury instructions as closely synonymous with "fair market value."[175] On appeal, the Schieles asserted that the court erred in using this restrictive definition.[176]

The supreme court noted that it had previously held that "fair market," for the purpose of determining enforceable remaining debt under the anti-deficiency statutes, is a broader concept than "fair market value."[177] The legislative history indicates that the state legislature intended for the jury to balance the competing interests of the debtor and mortgagee.[178] Also, all evidence bearing on the issue of value and the circumstances of the underlying transaction can be presented.[179] The same broad definition of "fair value" applies to all types of property.[180]

The trial court erred in defining "fair value" as synonymous with "fair market value."[181] Thus, the judgment was reversed and remanded for a new determination of the property's fair value.[182]

UNION STATE BANK V. WOELL

In *Union State Bank v. Woell*,[183] William Woell and Turning Point Manufacturing, Inc. (TPMI) appealed from a judgment

172. *Id.*
173. *Schiele*, 436 N.W.2d at 248.
174. *Id. See* Schiele v. First National Bank of Linton, 404 N.W.2d 479 (N.D. 1987).
175. *Schiele*, 436 N.W.2d at 249. The instruction was similar to instruction 1404 from the instruction on eminent domain in N.D.J.I. — Civil and reads, in part, "fair value . . . is the highest price for which the property can be sold in the open market by a willing seller to a willing purchaser, neither party acting under compulsion and both exercising reasonable judgment." *Id.* at 249 n.1.
176. *Id.* at 249.
177. *Id. See* Federal Land Bank of St. Paul v. Bergquist, 425 N.W.2d 360 (N.D. 1988)(fair value produces a fair and equitable result between the parties).
178. *Schiele*, 436 N.W.2d at 249 (quoting *Bergquist*, 425 N.W.2d at 364).
179. *Id.*
180. *Schiele*, 436 N.W.2d at 249.
181. *Id.*
182. *Id.* Justice Levine concurred and proposed that a jury instruction on fair value should include factors constituting "intrinsic" value such as family history, income-producing history, and investment of labor and funds. *Id.* at 250 (Levine, J., concurring).
183. 434 N.W.2d 712 (N.D. 1989).

awarding Union State Bank $78,005.19 on two overdue promissory notes and dismissing counterclaims against the bank.[184] Woell and TPMI borrowed money from the bank to finance development and production of a new product.[185] In November 1982, the promissory notes were consolidated and secured by items of machinery and a $100,000 purchase order.[186]

In March, TPMI and Woell entered into a memorandum agreement with the bank to execute a new note representing the amount previously consolidated.[187] The new note was to be paid on September 15, 1983, and if not paid, Woell agreed to sell the secured property at an auction and pay off the note by October 15, 1983.[188] An auction was subsequently held during which a bank representative informed the auctioneer's clerk of the bank's security interest.[189] The clerk then deposited the proceeds with the district court.[190] The bank brought an action seeking judgment on the two notes and payment of the auction proceeds.[191] Woell answered and counterclaimed.[192] The district court entered summary judgment in favor of the bank, declined to rule on the counterclaim, and granted a rule 54(b) (of the North Dakota Rules of Civil Procedure) certification.[193] TPMI and Woell appealed.[194] The supreme court dismissed the appeal, concluding that the certification had been "improvidently" granted, and the district court judgment was vacated.[195] On January 8, 1988, the bank again moved for summary judgment and to dismiss in part for failure to state a claim upon which relief can be granted; the trial court granted the motions.[196]

On appeal, Woell asserted that the trial court erred when it dismissed his counterclaim for breach of the obligation of good faith.[197] Woell based his claim on section 41-01-13 (1-203) of the

184. Union State Bank v. Woell, 434 N.W.2d 712, 714-15 (N.D. 1989). The district court awarded judgment against Woell and TPMI for $67,806.34 and against Woell for $8,581.89, and awarded $1,666.96 in costs and disbursements. *Id.* at 715.

185. *Woell*, 434 N.W.2d at 714.

186. *Id.*

187. *Id.* The amount of the new note was $39,753.65. *Id.*

188. *Id.*

189. *Woell*, 434 N.W.2d at 714.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Woell*, 434 N.W.2d at 714. *See* N.D.R. CIV. P. 54(b) (judgment upon multiple claims).

194. *Woell*, 434 N.W.2d at 714.

195. *Id.* (citing Union Bank v. Woell, 357 N.W.2d 234 (N.D. 1984)).

196. *Woell*, 434 N.W.2d at 714-15. *See* N.D.R. CIV. P. 12(b)(5) (failure to state a claim upon which relief can be granted).

197. *Woell*, 434 N.W.2d at 715. The trial court ruled that breach of an obligation of

North Dakota Century Code which defines good faith obligation.[198] However, the supreme court responded that a contract or duty to which the good faith can attach must first exist.[199] The bank had no "duty" to finance Woell's operations.[200] Further, no oral agreement existed because the items essential to an agreement were collectively absent.[201] Thus, there was no contractual or statutorily-imposed duty to which good faith could attach and no basis existed for a breach of good faith.[202]

Woell further alleged that the conduct of the bank's representative at the auction constituted bad faith.[203] However, a lender may monitor and protect its status as a secured creditor.[204] Moreover, the auctioneer had the duty to determine whether the goods were covered by any security agreement.[205] In fact, if there were an implied good faith obligation as Woell alleges, Woell had a duty to inform the auctioneer of the security interest.[206] Thus, the bank's actions were not considered evidence of bad faith.[207]

Woell asserted that summary judgment for the bank on his conversion claim was improper.[208] However, because Woell did not show that the bank "wrongfully exercised dominion over his personal property," the claim failed.[209] Woell had a duty to notify the auctioneer which particular property was subject to the bank's

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good faith was not recognized in North Dakota. *Id.* Even though the trial court should have treated the motion as one for summary judgment, the dismissal may be upheld if summary judgment would have been appropriate. *Id.*

198. *Woell*, 434 N.W.2d at 716. *See* N.D. CENT. CODE § 41-01-13 (1-203)(1983 and Supp. 1989)("[e]very contract or duty within this title imposes an obligation of good faith in its performance or enforcement").

199. *Woell*, 434 N.W.2d at 716 (citing Brown v. Indiana Nat'l Bank, 476 N.E.2d 888, 894 (Ind. Ct. App. 1985)). *See also* Bank of Hartland v. Arndt, 385 N.W.2d 219, 223 (Wis. Ct. App. 1986).

200. *Woell*, 434 N.W.2d at 717.

201. *Id. See* Cohse v. Atlantic Richfield Co., 389 N.W.2d 352, 355 (N.D. 1986)(requiring definiteness in a contract to be valid and enforceable); *see, e.g.*, Hunt v. McIlroy Bank and Trust, 616 S.W.2d 759, 762 (Ark. App. 1981)(essential terms); Labor Discount Center v. State Bank & Trust Co., 526 S.W.2d 407, 425 (Mo. Ct. App. 1975)(absence of one essential term not fatal).

202. *Woell*, 434 N.W.2d at 717.

203. *Id.* at 718.

204. *Id. See* NCNB Nat'l Bank of North Carolina v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987)(security interest not invalid because of failure to police the conduct of the debtor); Bank of Beulah v. Chase, 231 N.W.2d 738, 744 (N.D. 1975)(authorized to sell collateral).

205. *Woell*, 434 N.W.2d at 719 (citing Annotation, *Personal Liability of Auctioneer to Owner or Mortgagee for Conversion*, 96 A.L.R.2d 208 (1964)).

206. *Woell*, 434 N.W.2d at 719 (citing Rigby Corp. v. Boatmen's Bank and Trust Co., 713 S.W.2d 517, 528 (Mo. Ct. App. 1986)). But *cf.* N.D. CENT. CODE § 12.1-23-08 (1985 & Supp. 1989)(defrauding secured creditors).

207. *Woell*, 434 N.W.2d at 719.

208. *Id.* at 720. "Conversion is the wrongful exercise of dominion over the personal property of another." Great Am. Ins. v. Am. State Bank, 385 N.W.2d 460, 462 (N.D. 1986).

209. *Woell*, 434 N.W.2d at 720.

security agreement.[210]

Woell asserted that his claim that the bank breached a fiduciary duty to him was improperly dismissed.[211] The court noted that a debtor-creditor relationship is established between a bank and its customers.[212] A fiduciary relationship arises only under certain circumstances.[213] Woell did not present any evidence that inferred dominion or control by the bank over his business, hence, the claim was properly dismissed.[214]

Woell's claim of fraud was properly dismissed because it failed to show what conduct was alleged to be fraudulent and did not connect any factual assertions to the elements of fraud.[215]

The judgment was affirmed.[216]

CHILD ABUSE

IN INTEREST OF A.M.A.

In *In Interest of A.M.A.*[217] the issue was whether the state had shown by clear and convincing evidence the statutory criteria for terminating parental rights.[218] In February 1986, Cindy's and Loren's children were removed from their custody for suspected child abuse by an emergency court order.[219] The three children were an eight-month-old (Annette), a two-and-one-half-year-old (Tina), and a three-and-one-half-year-old (Neal).[220] Initially the three children, who were in foster care in Dickey County, North Dakota, were transferred to foster care in Minnesota.[221] In December of 1986, the juvenile court placed the children in temporary custody of their grandparents.[222] In November of 1987, a petition was filed to terminate the parental rights of Cindy and

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210. *Id.*

211. *Id.*

212. *Id.* at 721. *See* Faith, Hope and Love, Inc. v. First Alabama Bank, 496 So.2d 708, 711 (Ala. 1986).

213. *Woell*, 434 N.W.2d at 721 (citing *In Re* Red Cedar Const. Co., Inc., 63 B.R. 228, 242 (W.D. Mich. 1986); Nicoll v. Community State Bank, 529 N.E.2d 386, 389 (Ind. Ct. App. 1988)).

214. *Woell*, 434 N.W.2d at 721.

215. *Id. See* N.D. CENT. CODE § 9-03-08 (1987 & Supp. 1989)(elements of fraud). *See also* First Nat'l Bank of Hettinger v. Clark, 332 N.W.2d 264, 267 (N.D. 1983)(the court need not search the record for evidence opposing a summary judgment).

216. *Woell*, 434 N.W.2d at 721.

217. 439 N.W.2d 535 (N.D. 1989).

218. *In re* A.M.A., 439 N.W.2d 535, 537 (N.D. 1989).

219. *Id.* at 536.

220. *Id.* at 537. Neal and Tina showed signs of child abuse. *Id.*

221. *Id.* The maternal grandparents moved to join as parties in the legal action and also for grandparental visitation. *Id.*

222. *In re A.M.A.*, 439 N.W.2d at 537.

Loren.[223] Cindy appealed the juvenile court judgment that there was clear and convincing evidence to terminate her parental rights.[224]

The North Dakota Supreme Court noted that the statute for terminating parental rights is part of the Uniform Juvenile Court Act.[225] This act was adopted by the state legislature with a strong preference for parental guardianship.[226] The separation of a child from his parents should only take place when "necessary for his welfare or in the interest of public safety."[227] The criteria for terminating parental rights are: 1) the child is deprived; 2) that deprivation will continue into the future without change; and 3) consequently, the child will probably suffer serious harm.[228]

The supreme court next determined whether the juvenile court had the requisite "clear and convincing evidence" to make its determination.[229] The court looked at the three criteria individually to determine if there had been clear and convincing evidence as to each part.[230] The first question was to determine if the children had been "deprived."[231] The court ruled that the juvenile court's findings were clear and convincing within the meaning of deprived child.[232] The court then considered whether there was clear and convincing evidence that the abuse and deprivation would continue into the future.[233] Based on a psychological evaluation and findings of facts, the juvenile court determined that

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223. *Id.*

224. *Id.*

225. *Id.*; *see* N.D. CENT. CODE ch. 27-20 (1974 and Supp. 1987)(Uniform Juvenile Code Act).

226. *In re A.M.A.*, 439 N.W.2d at 537 (citing McGurren v. S.T., 241 N.W.2d 690, 695 (N.D. 1976)).

227. *In re* A.M.A., 439 N.W.2d at 537. N.D. CENT. CODE § 27-20-01(3)(1974); McGurren v. S.T., 241 N.W.2d 690, 695 (N.D. 1976).

228. *In re A.M.A.*, 439 N.W.2d at 537. *See* N.D. CENT. CODE § 27-20-44(1)(b) (1974)(lists three methods by which parental rights may be terminated).

229. *In re A.M.A.*, 439 N.W.2d at 537. The North Dakota Supreme Court reviewed the juvenile court's finding of "clear and convincing evidence based upon 'files, records, and minutes or transcript of the evidence of the juvenile court.'" N.D. CENT. CODE § 27-20-56(1)(1974). The supreme court also noted that it was not bound by these findings. *In re A.M.A.*, 439 N.W.2d at 537 (citing *In re* J.A.L., 432 N.W.2d 876, 878 (N.D. 1988)).

230. *In re A.M.A.*, 439 N.W.2d at 537-39.

231. *Id.* at 537. Section 27-20-02(5)(a) of the North Dakota Century Code provides in pertinent part:

> [Deprived child] [i]s without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health, or morals, and the deprivation is not due primarily to lack of financial means of the child's parents. . . .

N.D. CENT. CODE § 27-20-02(5)(a) (1974 and Supp. 1987).

232. *In re A.M.A.*, 439 N.W.2d at 538.

233. *Id.* Evidence of past deprivation alone is not enough; it must be clear that it will continue into the future (citing Waagen v. R.J.B., 248 N.W.2d 815 (N.D. 1976)).

Cindy would not be a proper parent in the future.[234] The supreme court decided that there was also clear and convincing evidence that the deprivation would continue.[235] As to the final question, the court determined that the children would suffer harm if they were returned to Cindy.[236] The court further concluded that there was clear and convincing evidence under the statutory criteria for terminating parental rights, and the court affirmed the decision of the juvenile court.[237]

CHILD CUSTODY

KALOUPEK V. BURFENING

In *Kaloupek v. Burfening*,[238] the mother of two-year-old Robert appealed from a district court judgment that granted joint physical custody of Robert to both parents on a six-month alternating basis.[239] The mother, Chris, and the father, Michael, had a continuing relationship between 1981 to 1987; however, the relationship never resulted in marriage.[240] In March of 1986, Robert was born to Chris and Michael, and in June of 1987, the relationship between Chris and Michael ended.[241] On appeal, Chris asserted that the trial court's ruling of joint physical custody was not in Robert's best interest and was clearly erroneous.[242]

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234. *In re A.M.A.*, 439 N.W.2d 538. The North Dakota Supreme Court also based its decision on facts from the memorandum decision including inability to stay employed, infrequent contact with children, marriage problems, attempted suicide. *Id.* at 538-39.

235. *Id.* at 539.

236. *Id.*

237. *Id.* The court noted that Annette was only eight months old and did not display the symptoms of a deprived child as did Neal and Tina. *Id.* However, the court also terminated the parental rights regarding Annette to protect her from any potential harm. *Id.* (citing Sexton v. J.E.H., 355 N.W.2d 828, 832 (N.D. 1984)(if parental rights are not terminated the younger child will be raised in the same environment as the older)).

238. 440 N.W.2d 496 (N.D. 1989).

239. Kaloupek v. Burfening, 440 N.W.2d 496, 497 (N.D. 1989). The joint physical custody arrangement between Chris Raloupek and Michael Burfening was to last until Robert started school at which time custody could be redetermined. *Id.*

240. *Kaloupek*, 440 N.W.2d at 497. In 1983 Chris and Michael purchased a home in Grand Forks where they lived with Chris' daughters from her previous marriages. *Id.*

241. *Id.*

242. *Id.* Chris argued that she was Robert's primary caretaker and that a six month separation from his mother and stepsisters was clearly not in his best interests. *Id.* She further asserted that the court had not given her expert witness adequate consideration and failed to apply factors four and five under section 14-09-06.2 of the North Dakota Century Code. *See* N.D. CENT. CODE § 14-09-06.2. Section 14-09-06.2 provides:

> For the purpose of custody, the best interests and welfare of the child shall be determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child. These factors include all of the following when applicable:
>
> * * *
>
> 4. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

The North Dakota Supreme Court stated that determination of child custody matters are questions of facts and, as such, would not be set aside unless clearly erroneous.[243] Furthermore, the court indicated that in North Dakota there is no presumption as to whether the mother or father will better promote the "best interests and welfare of the child."[244] After reviewing the trial court memorandum on the case, the supreme court held that "both parents have the ability and desire to care for Robert's needs" and Robert would benefit from the shared upbringing.[245] Therefore, the supreme court held that the trial court decision had not been clearly erroneous and as such affirmed the district court decision.[246]

MERTZ V. MERTZ

In *Mertz v. Mertz*[247] the issue was whether there was a clearly erroneous determination that there had been a significant change in circumstance and that it was in the best interest of the child to allow change of custody.[248] In 1983, Melody Mertz and Denis Mertz were divorced and the divorce decree awarded custody of their child, Scott, to Melody.[249] In 1988 Melody allowed Scott to live with his father for six months.[250] On June 23, 1988, Denis sought to modify the divorce decree and obtain custody of Scott.[251]

After a decision by a judicial referee and confirmation by district court, Denis was given custody of Scott.[252] Melody appealed

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5. The permanence, as a family unit, of the existing or proposed custodial home.

N.D. CENT. CODE § 14-09-06.2.

243. *Kaloupek*, 440 N.W.2d at 497 (citing Lapp v. Lapp, 293 N.W.2d 121 (N.D. 1980)). The court had previously stated that alternating custody is not per se erroneous. DeForest v. DeForest, 228 N.W.2d 919 (N.D. 1975).

244. *Kaloupek*, 440 N.W.2d at 497 (citing Gravning v. Gravning, 389 N.W.2d 621 (N.D. 1986)).

245. *Id.* at 498. The court noted that one of the factors the trial court based its decision on was the fact that Chris did not "manifest a desire to foster the father-son relationship between Michael and Robert." *Id.*

246. *Id.* at 498-99. The court dismissed both arguments set forth by Chris, that the trial court did not give due consideration to her expert, or that the court did not give deference to section 14-09-06.2 of the North Dakota Century Code. *Id.* at 498-99.

247. 439 N.W.2d 94 (N.D. 1989).

248. *Mertz v. Mertz*, 439 N.W.2d 94, 95-96 (N.D. 1989).

249. *Mertz*, 439 N.W.2d at 95.

250. *Id.* Melody's allowing Scott to live with Denis was one of the reasons given by Denis to support his claim of significant change in circumstances. *Id.* at 95-96. Other reasons stated were that Scott could not get along with his brothers, Melody had problems disciplining Scott, and Scott preferred living with his father. *Id.*

251. *Id.* at 95.

252. *Id.* The judicial referee found a significant change in circumstances. *Id.*

the decision on the grounds that there was not a significant change in circumstances nor was it in the best interests of the child that custody be transferred.[253] The North Dakota Supreme Court noted that there was a two-step analysis to follow in seeking a modification of a custody award.[254] First, the party seeking modification must show a significant change in circumstances.[255] Second, the court must determine if it is in the best interests of the child to allow modification.[256]

The supreme court would only set aside the lower court decision if it was found to be "clearly erroneous."[257] The judicial referee had decided there had been changed circumstances, and the supreme court ruled that this finding was not clearly erroneous.[258] As changed circumstances the referee cited Scott's inability to live harmoniously with his mother and two brothers, Melody's disciplinary trouble with Scott, and Scott's having lived with his father for over six months.[259] To complete the two-step analysis the court then looked at whether it would be in Scott's best interests to change custody.[260] Section 14-09-06.2 of the North Dakota Century Code lists factors to be considered in determining the child's best interests.[261] Only the factors listed in the section that are applicable to a situation need be considered.[262] The supreme court was satisfied that all applicable factors had been considered.[263] Thus, the court held that the best interests of Scott had been met and affirmed the lower court's judgment.[264]

WORDEN V. WORDEN

In *Worden v. Worden*,[265] Linda Worden appealed a divorce judgment awarding custody of her two minor children, Elizabeth

253. *Mertz*, 439 N.W.2d at 95.
254. *Id.* at 96.
255. *Id.*
256. *Id.*
257. *Id. See* N.D.R. CIV. P. 52(a) ("findings of fact shall not be set aside unless clearly erroneous. . . .")
258. *Mertz*, 439 N.W.2d at 96. Changed circumstances are "new facts" which were unknown to Denis at the time of the divorce decree. *Id.*
259. *Id.* at 96.
260. *Id.*
261. *Id. See* N.D. CENT. CODE § 14-09-06.2 (1971)(ten factors for a court to consider in deciding best interests of a child). The North Dakota Supreme Court noted that not all statutory factors need be met (citing *Lapp v. Lapp*, 293 N.W.2d 121 (N.D. 1980)).
262. *Mertz*, 439 N.W.2d at 97.
263. *Id.* Three of the factors discussed by the court were ability of parent to provide food, the drop in Scott's school grades, and Scott's preference. *Id.* at 96-97.
264. *Id.* at 97.
265. 434 N.W.2d 341 (N.D. 1989).

and Christopher, to James Worden.[266] When the Wordens married in 1985, they had a natural son, Christopher, who was seven months old.[267] Linda also had a four-year-old daughter, Elizabeth, from a previous marriage.[268] During the Wordens' marriage, Linda had primary care of the children while James held various types of employment.[269] The parties separated in 1987.[270]

During the divorce, the trial court found that it would be in both children's best interests to award custody to James with reasonable visitation for Linda.[271] The court found that exceptional circumstances — Linda's unstable lifestyle and the lack of contact between Elizabeth and her natural father — warranted granting James custody.[272] On appeal, Linda asserted that the custody decision was clearly erroneous.[273]

The court must award custody based upon a factual determination of the best interests and welfare of the child.[274] The trial court found that James had a more stable lifestyle and resources to care for minor children and that it would be in Christopher's best interest to live with his father.[275] Thus, the North Dakota Supreme Court found the placement of Christopher was not clearly erroneous.[276]

Elizabeth's situation required a different analysis.[277] Parents are entitled to the custody and companionship of their children.[278] When the custody dispute is between a parent and a non-parent, exceptional circumstances must exist before the court can determine that it would be in the best interest of the child to be placed with a non-parent.[279]

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266. Worden v. Worden, 434 N.W.2d 341, 341 (N.D. 1989).

267. *Worden*, 434 N.W.2d at 341.

268. *Id.* Elizabeth's natural father paid $75 per month support but did not exercise his visitation rights. *Id.*

269. *Id.* at 342.

270. *Id.*

271. *Worden*, 434 N.W.2d at 342.

272. *Id.* Linda was unemployed and living on public assistance. She had four residences since the separation: an apartment that was condemned, a mobile home from which she was evicted, a residence shared with eleven other persons, and a one-bedroom apartment. *Id.*

273. *Id.* The trial court's determination of custody is a finding of fact which will be set aside only if clearly erroneous. *See* N.D.R. CIV. P. 52(a).

274. *Worden*, 434 N.W.2d at 342. *See* N.D. CENT. CODE § 14-05-22(1)(1981 & Supp. 1989)(providing for custody determination either before or after the divorce action); and § 14-09-06.1 (1981 & Supp. 1989)(custody to be determined by the best interest or welfare of the child).

275. *Worden*, 434 N.W.2d at 342.

276. *Id.*

277. *Id.* (noting that Elizabeth is "Linda's natural daughter but is neither James's natural nor adopted child").

278. *Id.* (citing Hust v. Hust, 295 N.W.2d 316 (N.D. 1980).

279. *Worden*, 434 N.W.2d at 342. The test is whether or not there are exceptional

What constitutes exceptional circumstances has not been narrowly defined by the court.[280] They typically involve cases in which the child and non-parent have been physically together long enough to develop a psychological parent-child relationship.[281] This did not occur in Elizabeth's case, and therefore, the finding of exceptional circumstances was clearly erroneous.[282] The court did not address the issue of whether a split-custody arrangement would ever constitute exceptional circumstances.[283] The court noted that in this case there was no evidence to indicate that serious detriment would occur to either child due to the arrangement.[284]

If Linda's lifestyle raises the issue of child deprivation, proceedings under the Uniform Juvenile Court Act, chapter 27-20 of the North Dakota Century Code, are available.[285]

Christopher's custody placement was affirmed; Elizabeth's was reversed and remanded for entry of judgment.[286]

WRIGHT V. WRIGHT

In *Wright v. Wright*,[287] Tammy Wright appealed a modification of her divorce judgment which gave custody of her two minor children to former husband Lorin Wright.[288] The Wrights had divorced after a five year marriage.[289] Tammy was awarded physical custody of their three- and four-year-old daughters with Lorin allowed liberal visitation.[290] Three months following the judgment, Tammy moved to change the residence of the girls from Williston, N.D., to St. Louis, Mo., so that she could attend law school.[291] Lorin then moved for modification of the divorce judgment and custody of the children.[292]

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circumstances which require placing the child with a non-parent. Mansukhani v. Pailing, 318 N.W.2d 748 (N.D. 1982). Exceptional circumstances trigger the best-interest analysis. *In re* Buchholz, 326 N.W.2d 203 (N.D. 1982).

280. *Worden*, 434 N.W.2d at 342.

281. *Id. See* Daley v. Gunville, 348 N.W.2d 441 (N.D. 1984)(exceptional circumstances due to development of a parent relationship).

282. *Worden*, 434 N.W.2d at 342.

283. *Id.*

284. *Id. See also* Gravning v. Gravning 389 N.W.2d 621 (N.D. 1986).

285. *Worden*, 434 N.W.2d at 343. See N.D. CENT. CODE, § 27-20 (1974 & Supp. 1989). Parental unfitness is not the appropriate test for custody between a parent and a third person. *Id.* (citing *Mansukhani*, 318 N.W.2d at 748).

286. *Worden*, 434 N.W.2d at 343.

287. 431 N.W.2d 301 (N.D. 1988).

288. Wright v. Wright, 431 N.W.2d 301, 302 (N.D. 1988).

289. *Wright*, 431 N.W.2d at 302.

290. *Id.*

291. *Id.*

292. *Id.* at 303.

After an initial hearing, the court issued an interim order giving Lorin custody for two months in Williston followed by two months custody in St. Louis with Tammy.[293] Home studies, psychological evaluations of all family members, drug screening for Tammy, and drug/alcohol evaluation for both parents were ordered.[294] After receiving this data, the trial court concluded that conditions had changed, and it would be in the best interests of the children to remain in Williston with Lorin.[295] Tammy claimed that this decision was clearly erroneous.[296]

After noting that a trial court's decision to modify custody is subject to the clearly erroneous standard of review,[297] the North Dakota Supreme Court discussed the difference between an original award of custody and a subsequent modification.[298] The original decision is based on the best interests of the children.[299] A request to modify custody is based on the determination of two issues in chronological order: 1) whether there has been a change of circumstances since the original decree; and, if so, 2) whether the best interests of the children would be fostered by a change in custody.[300] Without significant changes, there can be no modification of the custody decision.[301]

The trial court's determination in *Wright* was based on three findings: 1) Tammy's move; 2) Tammy's psychological test results indicating a need for counseling and a possible adverse effect on the children; and 3) the existence of a stable home with Lorin in Williston.[302] However, the North Dakota Supreme Court noted that only when a custodial parent will move without the children if the court denies permission, does that move constitute changed

293. *Wright*, 431 N.W.2d at 303.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Wright*, 431 N.W.2d at 303 (citing Pitsenbarger v. Pitsenbarger, 382 N.W.2d 662, 664 (N.D. 1986); and N.D.R. CIV. P. 52(a). A finding of fact is clearly erroneous when there is no supporting evidence or when, reviewing all the evidence, the court has a firm conviction that a mistake has been made. Landsberger v. Landsberger, 364 N.W.2d 918, 920 (N.D. 1985). A finding of fact is also erroneous if induced by incorrect law. Manz v. Bohara, 367 N.W.2d 743, 746 (N.D. 1985).
298. *Wright*, 431 N.W.2d at 303 (citing Miller v. Miller, 305 N.W.2d 666, 671 (N.D. 1981)).
299. *Id.* *See* N.D. CENT. CODE § 14-09-06.1 (1981)(custody revolves around the best interests of the child).
300. *Wright*, 431 N.W.2d at 303 (citing Orke v. Olson, 411 N.W.2d 97, 99 (N.D. 1987); *Miller*, 305 N.W.2d at 671)).
301. *Wright*, 431 N.W.2d at 303 (citing *Pitsenbarger*, 382 N.W.2d at 664; Koller v. Koller, 377 N.W.2d 130 (N.D. 1985)). " 'Changed circumstances' " are new facts which were unknown to the movant at the time of the decree. Bergstrom v. Bergstrom, 296 N.W.2d 490, 493 (N.D. 1980).
302. *Wright*, 431 N.W.2d at 304.

circumstances for a custody determination.[303] This was not true in Tammy's case.[304] Also, Tammy's psychological status did not change subsequent to the divorce degree, and hence, this was not a new circumstance.[305] It was incorrect for the trial court to consider the best interests of the children at the threshold stage of determining changed circumstances.[306] Finally, the finding that a stable home existed in Williston was not a changed circumstance and again indicated that the court was considering the best interests of the children.[307] Thus, the trial court's findings were clearly erroneous and custody was returned to Tammy.[308] The issue of Tammy's motion to change residence was remanded.[309]

CIVIL PROCEDURE

ROLETTE EDUCATION ASS'N V. ROLETTE PUBLIC SCHOOL DIST. NO. 29

In *Rolette Educ. Ass'n v. Rolette Public School Dist. No. 29*,[310] the Rolette Education Association (REA) appealed a judgment denying a claim for declaratory and injunctive relief against the Rolette Public School District for breach of agreement.[311] The REA had sued the school district asserting that a unilateral change of health insurers for the 1987-88 school year violated their negotiated agreement.[312] The trial court concluded that section 15-47-15 of the North Dakota Century Code required bids to be submitted for health insurance contracts,[313] and therefore, the agreement requiring the REA to approve any change of carrier was

303. *Id.*

304. *Id.* When custody was changed to Lorin, Tammy withdrew from law school and moved back to Williston. *Id.*

305. *Wright*, 431 N.W.2d at 304. *See* Bergstrom, 296 N.W.2d at 493.

306. *Wright*, 431 N.W.2d at 304. *See* Okre, 411 N.W.2d at 99; Landsberger, 364 N.W.2d at 920.

307. *Wright*, 431 N.W.2d at 304. A finding of changed circumstances due to a stable home in Williston was based on an incorrect view of the law, it was clearly erroneous. See, Manz, 367 N.W.2d at 746.

308. *Wright*, 431 N.W.2d at 304.

309. *Id.* at 304-05. In dicta, the court noted that when a motion for a change of custody is dependent on a change of residence motion, the trial court should first resolve the issue of residence so as to avoid issuing interim decisions which may disrupt the children's lives; a speedy and complete resolution is preferable. 431 N.W.2d at 305 n.2. Justice VandeWalle concurred but recommended leaving trial courts the flexibility and discretion to decide the competing motions. (VandeWalle, J., concurring). *Id.* at 305.

310. 427 N.W.2d 812 (N.D. 1988).

311. Rolette Educ. Ass'n v. Rolette Public School Dist. No. 29, 427 N.W.2d 812, 812 (N.D. 1988).

312. *Rolette*, 427 N.W.2d at 813.

313. *Id.* *See* N.D. CENT. CODE § 15-47-15 (Supp. 1989)(bids required for school contracts involving over $8,000 unless specifically excepted).

void and unenforceable.[314]

The North Dakota Supreme Court held that the appeal was moot due to a post-judgment agreement between the REA and the school district excluding the approval decision.[315] The school district had requested adjudication on the grounds of public interest.[316] The court, however, found that no important state government interest was implicated by this single clause in a local school district contract.[317] The appeal was dismissed.[318]

CONSTITUTIONAL LAW

STATE V. MELIN

In *State v. Melin*,[319] the state appealed the dismissal of a complaint against Jonathan and Diana Melin charging them with violation of the compulsory school-attendance law.[320] The Melins had been educating their seven-year-old son at home although neither was certified to teach in North Dakota.[321] The trial court found that requirement of teacher certification was an unconstitutional infringement of the Melins' free exercise of religion.[322] Thus, the

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314. *Rolette*, 427 N.W.2d at 813.

315. *Id.* at 813-14.

316. *Id.* The court "will not dismiss an appeal as moot where the matter in controversy is one of great public interest" involving public officials or where the matter is " 'capable of repetition yet evading review.' " (citing State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307, 308 (N.D. 1988)). *Id.* at 814.

317. Rolette, 427 N.W.2d at 814. *See* Forum Publishing Co., v. City of Fargo, 391 N.W.2d 169, 170 (N.D. 1986)(defining public interest as something in which the public has a pecuniary interest or an interest involving their legal rights or liabilities).

318. *Rolette*, 427 N.W.2d at 815.

319. 428 N.W.2d 227 (N.D. 1988).

320. State v. Melin, 428 N.W.2d 227, 227 (N.D. 1988). *See* N.D. CENT. CODE § 15-34.1-03(4)(1981). Section 15-34.1-03(4) provides:

> The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:
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> 1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. *No such school shall be approved unless the teachers therein are legally certified in the state of North Dakota* in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws (amended Supp. 1989)(providing that a parent is qualified to supervise a program of home-based instruction if the parent is certified or certifiable in North Dakota, has a high school education and is supervised by a certified teacher, or has passed the national teacher exam). (Effective through June 30, 1993.)

N.D. CENT. CODE § 15-34-03(4) (1986).

321. *Melin*, 428 N.W.2d at 227-28.

322. *Id.* at 228.

complaint was dismissed and a "judgment of not guilty" issued.[323] The issue on appeal was whether the dismissal was erroneous because the certification requirement was constitutional.[324]

The Melins moved to dismiss the state's appeal contending that an adverse decision would place them in double jeopardy contrary to the Fifth Amendment of the United States Constitution.[325] However, the North Dakota Supreme Court ruled that the trial court's action was not an acquittal notwithstanding its phraseology.[326] The trial court had not resolved all of the factual elements of the offense.[327] It only dismissed the complaint because it determined that the North Dakota statute infringed on the Melins' first amendment rights.[328] That such a factual determination is not an acquittal is supported by the United States Supreme Court decision in *United States v. Scott*.[329] Therefore the court concluded that the double jeopardy clause of the fifth amendment did not bar the state's appeal.[330]

The Melins further asserted that the state had no statutory authority for appeal.[331] However, although the trial court characterized its action as a "judgment of not guilty," the supreme court noted that the complaint was actually dismissed.[332] An order dismissing a criminal complaint is appealable under section 29-28-07(1).[333]

The court analyzed the challenge to the statute under the "free exercise of religion clause" using a three-part test.[334] First,

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323. *Id.*

324. *Id.*

325. *Id.* *See* U.S. CONST. amend. V (providing "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

326. *Melin*, 428 N.W.2d at 229 (quoting from State v. Flohr, 259 N.W.2d 293, 295 (N.D. 1977)("The question of what constitutes an 'acquittal' is not to be controlled by the form of a judge's ruling")(citing United States v. Sisson, 399 U.S. 267 (1970)).

327. *Melin*, 428 N.W.2d at 229.

328. *Id.* at 230. *See* State v. Flohr, 259 N.W.2d at 293 (critical facts are those regarding some or all of the elements of the crime). *See also* N.D. CENT. CODE § 12-1-01 .03(1)(1985)(defining the elements of a criminal offense).

329. *Melin*, 428 N.W.2d at 230. *See* United States v. Scott, 437 U.S. 82 (1978)(double jeopardy clause of the fifth amendment did not serve as a bar to retrial if the trial court's decision was reversed), overruling United States v. Jenkins, 420 U.S. 358 (1975)(providing that double jeopardy occurred whenever resolution of any factual issues relating to the offense charged would be necessary upon reversal).

330. *Melin*, 428 N.W.2d at 231.

331. *Id.*

332. *Id.* In a criminal action the state has only a statutory right of appeal. State v. Borden, 316 N.W.2d 93 (N.D. 1982).

333. *Melin*, 428 N.W.2d at 231. *See* N.D. CENT. CODE § 29-28-07(1)(1974 and Supp. 1989)(providing that the state may appeal from "an order quashing an information or indictment or any count thereof").

334. *Melin*, 428 N.W.2d at 232 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)(providing:

"(1) whether the activity interfered with by the state is motivated by and rooted

the state conceded that the Melins were motivated by a sincerely held religious belief.[335] Second, the state had a compelling interest in the education of children and in ensuring that education is conducted by qualified persons.[336] This compelling interest justifies the burden placed on the free exercise of religion.[337] Third, requiring teachers for public and nonpublic schools to be certified satisfies the state's interest by means which are least restrictive to the free exercise of religion.[338] Further, other alternatives were considered and rejected by the 1987 legislature.[339] Thus, the trial court's dismissal of the complaint against the Melins for violating the compulsory school attendance was reversed and remanded to the trial court for determination of guilt or innocence.[340]

STATE V. TOMAN (TWO CASES)

In *State v. Toman*,[341] Chris Toman and Neil Toman appealed their conviction for violating the compulsory school attendance law pursuant to section 15-34.1-01 of the North Dakota Century Code.[342]

On appeal, the Tomans assert that the exemption provision specified in section 15-34.1-01 violates the due process clause because it allows public school officials to decide whether or not to grant the exemption.[343] The supreme court declined to address this issue stating; the Tomans are barred from raising objections to

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in a legitimate and sincerely-held religious belief: (2) whether the parents' free exercise of religion has been burdened by the regulation, and the extent of or impact of the burden on their religious practices; and (3) whether the state has a compelling interest in the regulation which justifies the burden on the free exercise of religion and overrides the interest of the parents in exercising their religious practices.")

See State v. Patzer, 382 N.W.2d 631 (N.D. 1986)(finding teacher certification to be constitutional when analyzed under a free-exercise-of-religion claim).

335. *Melin*, 428 N.W.2d at 232.

336. *Id.*

337. *Id.*

338. *Id.* at 233. See *Patzer*, 382 N.W.2d at 636; State v. Anderson, 427 N.W.2d 316 (N.D. 1988)(upholding certification as a least-restrictive alternative even though other alternatives have been studied).

339. *Melin*, 428 N.W.2d at 233 (quoting State v. Shaver, 294 N.W.2d 833, 900 (N.D. 1980)("The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality")).

340. *Melin*, 428 N.W.2d at 233. Justice Meschke dissented, concluding that there is no statutory authority for the state to appeal a criminal acquittal (citing Sanabria v. United States, 437 U.S. 54, 64 (1978)). *Id.* at 234-36. (Meschke, J., dissenting). *See also* State v. Anderson, 427 N.W.2d 316 (N.D. 1988)(dissent addressed substantive holding on freedom of religion).

341. 436 N.W.2d 10 (N.D. 1989).

342. State v. Toman, 436 N.W.2d 10, 11 (N.D. 1989). The Tomans failed to send their two children to school from September 1987 through December 10, 1987. *Id.* *See* N.D. CENT. CODE § 15-34.1-01 (1981 and Supp. 1989)(compulsory attendance-exceptions).

343. *Toman*, 436 N.W.2d at 11.

the exemption statute as a defense to their convictions because they did not seek an exemption for the time period in which the violation occurred.[344]

The Tomans further assert that the compulsory school attendance law is unconstitutional because the teacher certification requirement for religious schools is not the least restrictive alternative available to achieve the state's interest "in providing an adequate education for children."[345] The supreme court declined the Tomans' invitation to overturn prior decisions which had resolved the issue to the contrary.[346]

The judgment was affirmed.[347]

CONTEMPT

BAIER V. HAMPTON

In *Baier v. Hampton*,[348] the defendant, James Hampton, appealed the district court decision holding him in contempt of court.[349] The alleged contempt occurred during a number of court proceedings to determine Hampton's ability to pay his court ordered child support.[350] When questioned about his finances Hampton indicated that he was receiving $466 monthly in military retirement benefits but, failed to disclose his $606 a month for military educational benefits.[351] At a later hearing, the trial court learned of Hampton's additional benefits and held Hampton in contempt of court for failure to pay child support and for giving " 'deceitful and evasive' " answers.[352] Hampton appealed and the North Dakota Supreme Court partially reversed the holding.[353]

Upon remand, the criminal contempt charge against Hampton was assigned to the same judge who handled the child support hearings and the previous contempt hearing.[354] During the proceedings, Hampton unsuccessfully attempted to call the judge, the

344. *Id.*
345. *Id.*
346. *Id.* (citing State v. Anderson, 427 N.W.2d 316 (N.D.) *cert. denied*, 109 S.Ct. 491 (1988); State v. Patzer, 382 N.W.2d 631 (N.D.) *cert. denied*, 479 U.S. 825 (1986)).
347. *Toman*, 436 N.W.2d at 11.
348. 440 N.W.2d 712 (N.D. 1989).
349. Baier v. Hampton, 440 N.W.2d 712, 712 (N.D. 1989).
350. *Baier*, 440 N.W.2d at 712.
351. *Id.*
352. *Id.* at 713.
353. *Id.* The supreme court stated that the contempt charges for the deceitful answers was a criminal contempt matter and was governed by Rule 42(b) of the North Dakota Rules of Criminal Procedure (citing Baier v. Hampton, 417 N.W.2d 801 (N.D. 1987)). *See* N.D.R. CRIM. P. 42(b)(notice of criminal contempt must be given to defendant).
354. *Baier*, 440 N.W.2d at 713. Judge Wilson denied Hampton's demand for a change of judges and the presiding judge of the district court also denied Hampton's motion. *Id.*

state's attorney, and the assistant state's attorney as witnesses.[355] Most of the evidence presented against and for Hampton consisted of selected portions from the child support hearings.[356] However, when Hampton attempted to introduce certain evidence concerning the trial judge's statements, he was denied.[357] Hampton appealed and the issue before the supreme court was whether the judge should have excused himself.[358]

The supreme court stated that Rule 42(b) of the North Dakota Rules of Criminal Procedure would disqualify a judge if the contempt charge "involves disrespect to or criticism of 'that judge.' "[359] The court indicated that the explanatory note to Rule 42 directed that if the conduct of the trial judge was contributory to the circumstances of the contempt he should voluntarily step aside.[360] Furthermore, in *Baier* the court found numerous occasions where the judge's impartiality was in serious question.[361] The court stated that, while the judge had honestly attempted to conduct the contempt hearings in a fair manner, he should have dismissed himself.[362] Therefore the district court decision was reversed and the case was remanded for a new trial with a different presiding judge.[363]

CONTRACTS

JOHNSON V. PETERBILT OF FARGO, INC.

In *Johnson v. Peterbilt of Fargo, Inc.*[364] the issue was whether an employment contract provision withholding commissions of undelivered goods after termination of employment is void as

355. *Id.*

356. *Id.* Selected portions were also entered as exhibits. *Id.*

357. *Id.* In particular, one such denial was a statement by Judge Wilson which said "[v]ery often not responsive to the question, and that's partly our fault, perhaps. It's partly the fault of the attorney and partly the fault of the — the Court, and I learned something by it. . . ." *Id.*

358. *Baier*, 440 N.W.2d at 713.

359. *Id.* (citing N.D.R. Crim. P. 42(b)). The United States Supreme Court has stated, with relation to the identical federal rule, that a charge of false and evasive testimony does not automatically trigger disqualification (citing Nilva v. United States, 352 U.S. 385, 395-96 (1957)). *Baier*, 440 N.W.2d at 713.

360. *Baier*, 440 N.W.2d at 713-14 (citing N.D.R. Ct. 42 and N.D.R. Jud. Conduct 3(C)(1)).

361. *Id.* at 714. Furthermore, the trial judge's refusal to testify or allow any of his prior statements into evidence indicated a lack of impartiality. *Id.* at 415.

362. *Id.* at 716. The supreme court held that from review of the record it was unable to conclude that the balance of justice was not equally weighted between the state and the accused (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)). Furthermore, from his participation in the prior hearings, the judge had "plainly formed an opinion of Hampton's guilt." *Id.*

363. *Id.*

364. 438 N.W.2d 162 (N.D. 1989).

against public policy.[365] Mike Johnson was employed as a salesman by Peterbilt of Fargo between April 1984 and October 1985.[366] In January of 1985 the parties entered into a contract which, in part, specified that upon termination of employment, commission on undelivered vehicles would not be paid.[367] Johnson sold two trucks which were undelivered at the time of his termination, and Peterbilt refused to pay commissions on the vehicles.[368] The trial court ruled that Johnson had failed to prove that the contract clause constituted unjust enrichment or involuntary servitude or that it was unconscionable.[369] In addition, Johnson failed to show that section 34-03-09 of the North Dakota Century Code provided no relief.[370] Johnson appealed the decision, arguing that the contract provision was void.[371]

The North Dakota Supreme Court held that the contract provision was not void as against public policy, nor was it inconsistent with "fair and honorable dealing."[372] The court's conclusion was based on a reluctance to interfere with a person's right to enter into a contract.[373] Johnson relied upon section 34-03-09 of the North Dakota Century Code and contended that whenever a person works on commission, he or she is entitled to part of the profits that are procured.[374] The court declined to read the statute so narrowly as to limit a party's right to contract and stated that the clause was not inconsistent with fair dealing, or "offensive to good morals."[375] Thus, the district court decision was affirmed.[376]

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365. Johnson v. Peterbilt of Fargo, Inc., 438 N.W.2d 162, 163 (N.D. 1989).

366. *Johnson*, 438 N.W.2d at 163. Peterbilt is in the business of repairing and selling trucks, tractors, and trailers. *Id.*

367. *Id.*

368. *Id.* Total commissions claimed by Johnson were $4,128.68. *Id.*

369. *Id.*

370. *Id.* *See* N.D. CENT. CODE § 34-03-09 (1987)(compensation for employees upon termination of employment).

371. *Johnson*, 438 N.W.2d at 163. Peterbilt countered that Johnson willingly entered into the contract and thus there was no "overreaching." *Id.*

372. *Id.* at 165.

373. *Id.* at 164. " 'It is not the court's function to curtail the liberty to contract by enabling parties to escape their valid contractual obligation on the ground of public policy unless the preservation of the general public welfare imperatively so demands.' " (citing Tshirgi v. Merchants Nat'l Bank of Cedar Rapids, 253 Iowa 682, 690, 113 N.W.2d 226, 231 (1962)).

374. *Johnson*, 438 N.W.2d at 164. *See* N.D. CENT. CODE § 34-03-09, *supra* note 7.

375. *Johnson*, 438 N.W.2d at 164, 165. "The mere fact that he can show an injury flowing from Peterbilt's exercising its contractual rights does not compel this court to devise some basis for relief" (citing Minneapolis Threshing Machine Co. v. Hocking, 54 N.D. 559, 209 N.W. 996 (1926)).

376. *Id.* at 165.

CONTRACTS/INSURANCE

HOMES INS. OF DICKINSON V. SPELDRICH

In *Homes Ins. of Dickinson v. Speldrich*,[377] David Lawrence, and Vernon Speldrich appealed from a county court judgment holding them liable to Home Insurance of Dickinson (Home Insurance) for $3,142 in unpaid insurance premiums.[378] In January 1983, Eugene Speldrich, father of the appellants, obtained insurance coverage for vehicles used in his business, Speldrich Trucking, through his agent Home Insurance.[379] In January 1984, the "named insurance" was changed to include his wife and sons because the title to several vehicles had been placed in his sons' names in order to obtain financing.[380]

Eugene requested renewal of the policy for the 1985 to 1986 policy year, and Home Insurance paid the premium.[381] Speldrich Trucking was billed in installments, but it did not pay.[382] The policy was not renewed.[383] In April, Home Insurance sued Eugene, Ann, David, Lawrence, and Vernon Speldrich.[384] Eugene's and Ann's debts were discharged in bankruptcy court.[385] The trial court found that Davis, Lawrence, and Vernon owned six vehicles and that they had used the Speldrich Trucking business as a means to insure the vehicles.[386] Thus, they had received the benefits of insurance and were held jointly and severally liable for the unpaid premiums on their vehicles.[387]

The supreme court noted that the trial court apparently had based liability on the doctrine of unjust enrichment.[388] The doctrine provides a basis for restitution of the benefits received.[389] A

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377. 436 N.W.2d 1 (N.D. 1989).

378. Home Ins. of Dickinson v. Speldrich, 436 N.W.2d 1, 1-2 (N.D. 1989).

379. *Speldrich*, 436 N.W.2d at 2. Eugene obtained general liability, automobile liability, and physical-damage insurance from Fireman's Fund Insurance Company. *Id.* Eugene Speldrich, d/b/a Speldrich Trucking was the named insured. *Id.*

380. *Id.* at 2.

381. *Id.* During the course of the year vehicles were added or dropped as requested. *Id.*

382. *Id.*

383. *Speldrich*, 436 N.W.2d at 2.

384. *Id.* The amount sought was $8,789.21 which represented unpaid premiums and late payment charges. *Id.*

385. *Id.*

386. *Id.*

387. *Speldrich*, 436 N.W.2d at 2.

388. *Id.* at 2-3 (citing Cavalier County Memorial Hosp. Ass'n v. Kartes, 343 N.W.2d 781 (N.D. 1984)). Unjust enrichment is an equitable doctrine based upon quasi or constructive contracts implied by law to prevent a person from unjust enrichment.

389. *Speldrich*, 435 N.W.2d at 3 (citing D.C. Trautman Co. v. Fargo Excavating Co., 380 N.W.2d 644 (N.D. 1986)). A showing of fraud is not a prerequisite to recovery. Sykeston Township v. Wells County, 356 N.W.2d 136 (N.D. 1984).

trial court's decision that a party has or has not been unjustly enriched is fully reviewable.[390]

Appellants asserted that because they were not parties to the contract, they cannot be held liable even if they gained a benefit.[391] This is not always the case.[392] However, "there is apparently unanimity that the named ensured is not liable for payment of premiums where that insured has not contracted to pay premiums."[393] The court agreed and concluded, in this case, that the placing of title to the vehicles and securing insurance in applicants' names was for the benefit of the father, Eugene.[394] Eugene was not his sons' agent, nor was Home Insurance under that impression.[395] Further, the record did not support liability under a partnership theory.[396] In the absence of an agency or partnership or a contract, there was not liability on the part of the appellants.[397]

The judgment is reversed.[398]

CRIMINAL LAW

CITY OF GRAND FORKS V. CAMERON; CITY OF GRAND FORKS V. KRILE

In *City of Grand Forks v. Cameron; City of Grand Forks v. Krile*,[399] Tom Krile and Michael Cameron appealed from convictions of violating a city ordinance that prohibits obstructing public officers in the discharge of their duties.[400] Krile and Cameron

390. *Speldrich*, 436 N.W.2d at 3 (citing Midland Diesel Service & Engine v. Sivertson, 307 N.W.2d 555 (N.D. 1981)).

391. *Speldrich*, 436 N.W.2d at 3.

392. *Id.* *See* Midland Diesel Service, 307 N.W.2d at 559 (a third party who desires gain from an agreement is not necessarily unjustly enriched but the court must consider whether the third party participated in the transaction); Paschall's, Inc., v. Dozier, 407 S.W.2d 150, 154-55 (Tenn. 1966)(providing that recovery from the person with whom there is a contract precludes recovery from third persons incidentally benefitted).

393. *Speldrich*, 436 N.W.2d at 3-4. *See* Century Ins. Agency, Inc., v. City Commerce Corp., 396 P.2d 80 (Alaska 1964)(holding that a landlord was not responsible for insurance premiums on a policy procured by the tenant as required by the lease because the leaser had made no promise); Stevens Ins., Inc., v. Howells, 473 P.2d 523 (Mont. 1970)(vendor must make a promise or contract to pay premiums of insurance to be liable even when coinsured); A. Copeland Enterprises v. Pickette & Meador, 422 So. 2d 752 (Miss. 1982)(lessor is not liable unless it contracted to pay the premiums); Midland Ins. Co. v. Universal Technology, 508 A.2d 427 (1986)(a named insured does not become liable for premium on that fact alone).

394. *Speldrich*, 436 N.W.2d at 4.

395. *Id.* at 4-5.

396. *Id.* at 5.

397. *Id.*

398. *Id.*

399. 435 N.W.2d 700 (N.D. 1989).

400. City of Grand Forks v. Cameron, 435 N.W.2d 700, 701 (N.D. 1989). *See* GRAND FORKS, N.D., CODE § 9-0205 (1987)("Every person who willfully delays or obstructs a public

were arrested when police dispersed guests from an early morning house party.[401] On appeal, the defendants claimed: 1) that the ordinance was facially invalid, unconstitutionally vague, and/or overbroad; 2) the evidence presented at trial did not support their convictions; 3) the trial court should have dismissed the charges; 4) that the court erred in failing to clarify the word "remonstrate" for the jury; and 5) a mistrial should have been declared due to improper and inflammatory remarks made by the city attorney.[402]

Regarding the constitutional claim, the supreme court noted that the issue was not raised in the trial court, and issues not raised below are not addressed on appeal.[403]

To challenge the sufficiency of the evidence, the defendant must show that the evidence produces no reasonable inference of guilt when viewed in the light most favorable to the verdict.[404] Construing the ordinance, the supreme court determined that the city did not indicate an intent to prohibit conduct beyond that proscribed by the corresponding state statute that prohibits obstruction of the administration of law or govern mental functions.[405] Thus, violation of the city ordinance requires physical acts as does section 12.1-08-01 of the North Dakota Code.[406] Defendant Krile was arrested after asking twice why officers were arresting people and removing them from the house.[407] Krile's questions did not constitute physical obstruction and his conviction was reversed.[408] Cameron, however, refused to leave the house after being instructed to do so, and he stepped in front of an

officer in the discharge or attempt to discharge any duty of his office, shall upon conviction thereof, be punished as herein provided.")

401. *Cameron*, 435 N.W.2d at 701.

402. *Id.* at 701-02.

403. *Id.* at 702. The defendants had relied on City of Houston v. Hill, 482 U.S. 451 (1987) as support for declaring that the city ordinance inhibited constitutionally protected speech and was facially invalid. *Cameron*, 435 N.W.2d at 702. The court cited State v. Miller, 388 N.W.2d 522 (N.D. 1986) in rebuttal; even constitutional issues will not be addressed, if not raised below, unless there is obvious error. *Cameron*, 435 N.W.2d at 702.

404. *Cameron*, 435 N.W.2d at 702 (citing State v. Lowenstein, 346 N.W.2d 292, 293 (N.D. 1984)).

405. *Cameron*, 435 N.W.2d at 702. *See* N.D. CENT. CODE § 12.1-08-01 (1985 & Supp. 1989)(proscribing physical obstruction of the administration of law or government). *See* 1 *Working Papers of the National Commission on Reform of Federal Criminal Laws* 517, 519 (1972)(limiting obstruction to physical acts). *See* City of Dickinson v. Mueller, 261 N.W.2d 787 (N.D. 1977)(an ordinance not in conflict did not supersede state law). Section 12.1-01-05 of the North Dakota Century Code clearly expresses an intent to have statewide uniformity in criminal law. City of Bismarck v. Hoopman, 421 N.W.2d 466, 468 (N.D. 1988).

406. *Cameron*, 435 N.W.2d at 702. *Compare* State v. Krawsky, 426 N.W.2d 875 (Minn. 1988)(similar state statute directed solely at physical acts of obstruction).

407. *Cameron*, 435 N.W.2d at 702.

408. *Id.*

officer and attempted to enter the house.[409] This conduct could reasonably lead a jury to infer that Cameron physically obstructed the officer in the performance of his duties.[410]

There was evidence of physical obstruction by Cameron and thus, there was no error in denying a motion for dismissal of the charges.[411]

Furthermore, the trial court informed both counsel and the jury that if the jury had questions concerning the instructions, they could inquire.[412] The word in contention, "remonstrating," was defined by defense counsel in his final argument.[413] No questions were asked by the jury, and the supreme court concluded that there was no reversible error.[414]

The city conceded that the prosecutor engaged in improper argument, but the trial court sustained defense counsel's objection and admonished the jury to disregard the comments.[415] The prosecutor's comments did not appear to affect the jury's ability to fairly evaluate the evidence and did not warrant a mistrial.[416] Krile's conviction was reversed and Cameron's conviction was affirmed.[417]

DISBARMENT OF ATTORNEYS

MATTER OF ELLIS

In *Matter of Ellis*[418] the issue was whether an emotional depression should be a mitigating factor in an action to disbar an attorney.[419] The Disciplinary Board of the North Dakota Supreme Court recommended that Cheryl Ellis be disbarred from the prac-

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409. *Id.*

410. *Id.* at 703. Mere verbal disagreements would not generally be considered an unlawful obstruction. *Id. See, e.g.*, District of Columbia v. Little, 399 U.S. 1 (1950); State ex rel. Wilmoth v. Gustke, 373 S.E.2d 484 (W. Va 1988); Annotation, *What Constitutes Obstructing or Resisting an Officer in the Absence of Actual Force*, 44 A.L.R. 3d 1018 (1972).

411. *Cameron*, 435 N.W.2d at 703.

412. *Id.* The instructions were that "merely remonstrating with an officer . . . does not amount to obstructing or delaying an officer in the performance of his duties." *Id. See* State v. Rott, 380 N.W.2d 325 (N.D. 1986)(similar instructions).

413. *Cameron*, 435 N.W.2d at 704.

414. *Id.*

415. *Id.* A jury is presumed to follow the court's admonitions. State v. Janda, 397 N.W.2d 59, 65 (N.D. 1986).

416. *Cameron*, 435 N.W.2d at 704. A mistrial will be granted only to prevent manifest injustice. State v. Kaiser, 417 N.W.2d 376, 379 (N.D. 1987). Inappropriate comments alone are not enough to justify a mistrial in an otherwise fair proceeding. United States v. Young, 470 U.S. 11 (1985). *See also* State v. Carr, 346 N.W.2d 723, 725-26 (N.D. 1984)(similar incident which did not warrant a mistrial).

417. *Cameron*, 435 N.W.2d at 704.

418. 439 N.W.2d 808 (N.D. 1989).

419. *In re* Ellis, 439 N.W.2d 808, 810-11 (N.D. 1989).

tice of law for failure to attend to her client's matters.[420] It was found that in three cases she had been guilty of "misrepresentation, neglect, and failure to provide diligent and professional representation" for her clients.[421]

This action was to review the decision of the Disciplinary Board.[422] The North Dakota Supreme Court noted that its review must be *de novo* and the standard of proof must be by clear and convincing evidence.[423] However, the review was more than a formality, and the findings of the Disciplinary Board must not automatically be approved.[424] After reviewing the three cases for which the disciplinary action was brought, the supreme court concluded that there was clear and convincing evidence to determine that Ellis had violated the Code of Professional Responsibility.[425]

Ellis requested that the disciplinary sanctions be mitigated because she claimed that she was suffering from major depression at the time of the alleged violations.[426] The supreme court agreed and determined that Ellis had shown that she had suffered severe depression during the period in question.[427] Thus, the court held that disbarment was unduly harsh and imposed disciplinary action that included a two-year suspension with all but the first 90 days stayed and a one year probation provided Ellis complied with certain probationary conditions.[428]

DIVORCE

BARANYK V. MCDOWELL

In *Baranyk v. McDowell*,[429] a former wife sought to modify a district court judgment adjudicating the child support payments of her former husband, James R. McDowell.[430] In her motion to

420. *Ellis*, 439 N.W.2d at 809-10.

421. *Id.* at 810. The Disciplinary Board found that Ellis had violated the Model Code of Professional Responsibility, Cannon 1, DR T-102(A)(4), (5), and (6); Cannon 6, DR 6-101(A)(3); and Cannon 7, DR 7-101(A)(1), (2), (3)(1980). *Id.* These sections pertain to unprofessional conduct such as misrepresentation, neglect, and failure to carry out a contract which may result in disciplinary action. *Id.* 809-10.

422. *Ellis*, 439 N.W.2d at 809.

423. *Id.* (citing *Disciplinary Board of Supreme Court v. McKennett*, 349 N.W.2d 29 (N.D. 1984)).

424. *Ellis*, 439 N.W.2d at 809. Each case must be decided on its own facts. *Id.*

425. *Id.* at 810.

426. *Id.*

427. *Id.* " '[P]ersonal or emotional problems' " and 'physical or mental disability or impairment' " are mitigating factors to be applied if appropriate. *Id.*, *see* North Dakota Standards for Imposing Lawyer Sanctions, ¶ 9.32(c)(h) (1988)(standards designed to assist in imposing disciplinary sanctions against attorneys).

428. *Id.* at 810-11.

429. 442 N.W.2d 423 (N.D. 1989).

430. Baranyk v. McDowell, 442 N.W.2d 423, 423 (N.D. 1989). McDowell, acting pro

amend, Terry Baranyk sought to include judgment interest in the judgment.[431] The motion to amend was denied by a district court and Baranyk appealed.[432]

In her appeal Baranyk contends that the legislative intent of the statute allowing nonpayment of child support to become a judgment is consistent with an award of judgment interest.[433] Baranyk claims that the denial of her motion by the district court was clearly erroneous.[434]

Baranyk's judgment against McDowell made no provision for prejudgment interest.[435] The court cited its holding in *Dick v. Dick*,[436] which provided for prejudgment interest in alimony support, in remanding the issue of calculating interest on payments prior to March 23, 1987.[437]

After determining that prejudgment interest should be added to Baranyk's judgment, the court examined the question of whether section 14-08.1-05.1(1)(a) of the North Dakota Century Code provides for interest to accrue on unpaid child support payments when they became due.[438]

"Interest" is not mentioned in the statute, but the language in it provides that the unpaid support payment are to be judgments, with "full force, effect, and attributes of a district court judgment."[439]

If a statute is ambiguous the court may consider extraneous

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se, did not answer the motion adjudicating child support nor the motion to add the interest. *Id.* at 424.

431. *Baranyk*, 442 N.W.2d at 424.

432. *Id.* After his divorce from Baranyk, McDowell consistently failed to make court ordered child support payments. *Id.* at 423. On September 24, 1988, pursuant to Rule 3.2 of the North Dakota Rules of Court, Baranyk filed a motion to obtain an order adjudicating the amount as a judgment under section 14-08.1-05 of the North Dakota Century Code. *Id.* at 423-24. Section 14-08.1-05 of the North Dakota Century Code provides that an order directing child support payments is a judgment on and after the date payment is unpaid and due. N.D. CENT. CODE § 14-08-1.-5 (1987). This judgment has the full force and effect of a judgment of the district court. *Id.* McDowell did not answer the motion and a judgment was entered against McDowell for $11,780 on October 11, 1988. *Baranyk*, 442 N.W.2d at 424. Baranyk's second motion to amend the judgment to contain judgment interest was also not answered by McDowell, and was denied by the district court. *Id.*

433. *Id.* at 424.

434. *Id.* The supreme court determined that since section 14-08.1-05 of the North Dakota Century Code was not enacted until 1987, the law allowing support orders to become judgments did not apply to the payments due from 1983 to 1987. *Baranyk*, 442 N.W.2d at 424.

435. *Id.*

436. 434 N.W.2d 557 (N.D. 1989).

437. *Baranyk*, 442 N.W.2d at 424. In *Dick*, the court held that if a judgment of divorce contains no reference to interest, section 28-20-34 of the North Dakota Century Code applies and usual interest rates for judgments come into play. Dick v. Dick, 434 N.W.2d 557, 559 (N.D. 1989). *See* N.D. CENT. CODE § 28-20-34 (1987)(interest rates on judgments).

438. *Baranyk*, 442 N.W.2d at 424.

439. N.D. CENT. CODE § 14-08.1-05(1)(a) (1987).

information such as legislative history in order to determine legislative intent.[440] Thus the court discussed what the legislative intent was with regard to interest when section 14-08-05 of the North Dakota Century Code was passed.[441]

The North Dakota Supreme Court drew their conclusion from the testimony before the senate committee that the statute was intended to bring North Dakota into compliance with federal child support enforcement guidelines.[442]

The court found that the legislature intended to treat past due child support payments as judgments and that interest was to be ascertained in the same fashion as judgments entered by the district court.[443]

The supreme court reversed the district court order denying the motion to include interest and remanded the case to the trial court, directing it to award interest at the statutory rate.[444]

BYZEWSKI V. BYZEWSKI

In *Byzewski v. Byzewski*,[445] Marilynn Byzewski, a member and resident of the Standing Rock Sioux Indian Reservation, appealed the custody and alimony provisions of a default divorce decree from Raphael Byzewski, a non-Indian.[446]

Marilynn and Raphael married in Grand Forks in 1979.[447] At the time, they had three children.[448] They divorced in 1980 and split custody of the children.[449] The divorce decree was subsequently amended with Marilynn's retaining one child and Raphael's parents in Manvel, North Dakota, receiving custody of the two younger children.[450]

In 1983, the parties remarried in South Dakota and lived on

440. *Baranyk*, 442 N.W.2d at 425 (citing First Security Bank v. Enyart, 439 N.W.2d at 801 (N.D. 1989)).
441. *Id.* at 425.
442. *Id.* The federal guidelines make child support obligations that are unpaid equivalent to judgments so as to prevent retroactive modification. *Id.*
443. *Id.* at 426. The exception is that past-due child support obligations could not be entered in the judgment docket until the district court made an order for judgment and the judgment was filed with the district court clerk according to Rule 58 of the North Dakota Rules of Civil Procedure. *Id.* at 426. *See* N.D.R. CIV. P. 58 (entry of judgment). Section 28-20-34 of the North Dakota Century Code provides that interest on a judgment not based upon an original instrument shall be 12%, thus the past due child support would accrue interest at that rate. *Baranyk*, 442 N.W.2d at 426.
444. *Baranyk*, 442 N.W.2d at 426.
445. 429 N.W.2d 394 (N.D. 1988).
446. Byzewski v. Byzewski, 429 N.W.2d 394, 395 (N.D. 1988).
447. *Byzewski* at 395.
448. *Id.*
449. *Id.*
450. *Id.*

the Standing Rock Sioux Indian Reservation with their three children until 1986, when the couple separated.[451] Marilynn obtained several interim orders including a temporary custody order and a temporary restraining order from the tribal court.[452] Raphael moved to Grand Forks with two children and filed for divorce in district court where Marilynn's motion to dismiss for lack of jurisdiction was denied.[453] The district court awarded Raphael custody of the children and ordered Marilynn to pay child support.[454] The tribal court issued Marilynn a divorce decree awarding her custody, child support, and alimony.[455]

Marilynn appealed the district court's judgment claiming lack of subject matter jurisdiction because the action arose on a reservation.[456] Her claim was predicated on *Williams v. Lee*,[457] a United States Supreme Court decision that barred state courts from adjudicating claims by non-Indians against Indians, arising on a reservation.[458] The North Dakota Supreme Court determined that *Williams* was applicable to child custody and support claims in a divorce action, because of the clear policy of the federal government's favoring tribal self-government.[459] The tribal court's temporary orders were first-in-time, and the custodial domicile was the reservation.[460] Hence, the exercise of jurisdiction by the state court interfered with tribal sovereignty.[461]

The North Dakota Supreme Court noted that jurisdictional prerequisites for divorce, custody, and support payments differ.[462] As long as procedural due process requirements are met, district courts may terminate marriages.[463] However, a court must have

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451. *Byzewski*, 429 N.W.2d at 395.

452. *Id.*

453. *Id.* at 395-96.

454. *Id.* at 396.

455. *Id.*

456. *Id.*

457. 358 U.S. 217 (1959).

458. *Byzewski*, 429 N.W.2d at 396. *See* R.J. Williams Co. v. Belknap Housing Auth., 719 F.2d 979, 983 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985)(describing a tribe's interest in self-governance).

459. *Byzewski*, 429 N.W.2d at 397 (discussing application of Williams v. Lee, 358 U.S. 217 (1959)).

460. *Id.*

461. *Id.*

462. *Id. See generally* Reliable, Inc. v. Stutsman County Comm'n, 409 N.W.2d 632, 634 (necessity for personal and subject matter jurisdiction in civil cases).

463. *Byzewski*, 429 N.W.2d at 397 (citing Schillerstrom v. Schillerstrom, 75 N.D. 667, 699-702, 32 N.W.2d 106, 122-24 (1948)). *See* Shulze v. Shulze, 322 N.W.2d 250, 252 (N.D. 1982)(after a six-month residency, a court may grant a divorce no matter where the defendant spouse resides).

personal jurisdiction to adjudicate alimony or support.[464] Whether personal jurisdiction is required to settle child custody is unsettled.[465]

The state court itself may gauge whether it has subject matter jurisdiction.[466] Contacts with the state may not be sufficient to grant personal jurisdiction over an Indian domiciled on a reservation.[467] Further, domestic relations among tribal members are important to tribal self-government.[468] Thus, Raphael's residency in Grand Forks County did not outweigh the tribe's right to "make their own laws and be ruled by them."[469]

Raphael argued that the first amended divorce decree, giving his North Dakota parents custody, establishes state court jurisdiction, but when parties remarry prior custody provisions are generally nullified.[470] Raphael also cited *Three Affiliated Tribes v. Wold Eng'g*[471] as preempting chapter 27-19 of the North Dakota Century Code.[472] However, chapter 27-19 was not preempted insofar as it required consent for state jurisdiction over a claim arising on a reservation between a non-Indian and an Indian.[473] Here, the tribe did not consent to state jurisdiction and provided an available forum.[474] Finally, Raphael's due process and equal protection rights were not violated because " 'such disparate treatment of the Indian (his spouse) is justified because it is intended to benefit the class of which [s]he is a member. . . .' "[475]

The divorce was affirmed, while the child custody and support claims were revised.[476]

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464. *Byzewski*, 429 N.W.2d at 397 (citing Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957)).

465. *Id.* at 398. *See* Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 764-90 (1982).

466. *Byzewski*, 429 N.W.2d at 298. *See Williams*, 358 U.S. 217 (1959)(an infringement test for subject matter jurisdiction).

467. *Byzewski*, 429 N.W.2d at 398. *See generally* Fisher v. District Court 424 U.S. 382, 389 n.14 (1976)(application of the infringement test in an adoption proceeding).

468. *Byzewski*, 429 N.W.2d at 399 (citing three affiliated Tribes v. Wold Engineering, 476 U.S. 877, 889 (1986)).

469. *Id.* (quoting Williams v. Lee, 358 U.S. at 220).

470. *Id.* at 400 (citing Annotation, *Effect on Remarriage of Spouses to Each Other on Child Custody and Support Provisions of Prior Divorce Decree*, 26 A.L.R. 4th 325 (1983)).

471. 467 U.S. 138 (1984).

472. *Byzewski*, 429 N.W.2d at 400. *See* Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138 (1984) [Three Tribes I]; Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877 (1986) [Three Tribes II]; N.D. CENT. CODE § 27-19 (1974 and Supp. 1989)(Indian Civil Jurisdiction).

473. *Byzewski*, 429 N.W.2d at 401 (citing McKenzie County Social Services Bd. v. V.G., 392 N.W.2d 399, 402 (N.D. 1986) *cert. denied*, 480 U.S. 930 (1987)).

474. *Id.*

475. *Id.* (quoting Fisher v. District Court, 424 U.S. 382, 391 (1976)).

476. *Id.* at 401.

NOVAK V. NOVAK

In *Novak v. Novak*,[477] a child's preference was not a controlling factor in awarding child custody.[478] After Richard and Jacque Novak were divorced in October 1984, Joel Novak, then age nine, was placed by stipulated divorce decree in Jacque's principal custody.[479] Through the same decree Richard was awarded reasonable visitation rights with Joel.[480] Joel was one of two sons born to the Novak marriage.[481] An older son, Daniel, is autistic and resides at the Grafton State School.[482] In June 1986, Jacque remarried.[483] Jacque sought, in September 1988, a court order to change Joel's residence from Grand Forks, North Dakota, to Colorado Springs, Colorado.[484] Shortly after Jacque's motion for change of residence, Richard moved for a change of custody.[485] Throughout the proceedings, Joel expressed his preference of living with his father.[486] The district court granted Jacque's motion for change of residence and denied Richard's motion for change of custody.[487] On appeal, the North Dakota Supreme Court affirmed the district court's judgment and *held* that the trial court's authorization of the change of residence and its denial of the change of custody was not clearly erroneous.[488]

DIVORCE AND SEPARATION

BEHM V. BEHM

In *Behm v. Behm*,[489] Roger Behm appealed a decree of divorce from Frances Behm.[490] The trial court ordered Roger to pay child support of $700 per month and spousal support of $1,250 per month, in addition, the court divided all property nearly equally.[491] The issues on appeal were whether the trial court erred in awarding spousal support, in determining property val-

477. 441 N.W.2d 656 (N.D. 1989).
478. *Novak v. Novak*, 441 N.W.2d 656, 657 (N.D. 1989).
479. *Novak*, 441 N.W.2d at 657.
480. *Id.*
481. *Id.*
482. *Id.* Joel has maintained contact with Daniel on a regular basis and has expressed to the court that he enjoys these visits. *Novak*, 441 N.W.2d at 659 (Vande Walle, J., concurring specially).
483. *Novak*, 441 N.W.2d at 657.
484. *Id.*
485. *Id.* Richard requested the trial court to award him principal custody of Joel. *Id.*
486. *Id.* at 659 (Vande Walle, J., concurring specially).
487. *Novak*, 441 N.W.2d at 657.
488. *Id.*
489. 427 N.W.2d 332 (N.D. 1988).
490. Behm v. Behm, 427 N.W.2d 332, 333 (N.D. 1988).
491. *Behm*, 427 N.W.2d at 334.

ues, and in dividing a profit-sharing fund and inherited property.[492]

Based on Roger's stable monthly income of $2,500 and additional fluctuating monthly income, the supreme court determined that spousal support of $1,250 was appropriate to allow Frances to continue living at her accustomed standard of living.[493] The court also found that the lack of a fixed term for spousal support was not clearly erroneous when the trial court retained continuing jurisdiction and could respond to changed economic circumstances.[494]

The supreme court upheld the trial court's valuation of property as being supported by the evidence and not clearly erroneous.[495] In terms of property division, an award of $41,000 was not clearly erroneous because Roger had disposed of an $82,000 profit-sharing fund in violation of an interim restraining order.[496]

The court mandated the division of the husband's undistributed inheritance.[497] In support of this decision, the court noted the longevity of the marriage, the existence of three children, and marital misconduct.[498] There was no other savings or liquid investments with which to recognize Frances's contributions as a homemaker.[499] The supreme court affirmed indefinite spousal support, property valuation, and nearly equal property decision.[500]

DRAM SHOP ACTS

AANENSON V. BASTIEN

In *Aanenson v. Bastien*[501] the issue was whether "complicity"

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492. *Id.* at 333.

493. *Id.* at 334 (citing Wheeler v. Wheeler, 419 N.W.2d 923 (N.D. 1988); Bagan v. Bagan, 382 N.W.2d 645 (N.D. 1986)).

494. *Behm*, 427 N.W.2d at 334-35 (citing Wheeler v. Wheeler, 419 N.W.2d 923 (N.D. 1988)). The North Dakota Supreme Court noted that Frances's endeavor to accredit herself as a secondary teacher did not detract from the spousal support award. *Behm*, 427 N.W.2d at 335.

495. *Behm*, 427 N.W.2d at 335.

496. *Id.*

497. *Id.* at 336-37. "Inherited property can be divided between spouses to make an equitable division of property." *Id.* (citing Winter v. Winter, 338 N.W.2d 819 (N.D. 1983)). *See also* Anderson v. Anderson, 390 N.W.2d 584 (N.D. 1986)(providing that a substantial part of inherited property be set aside to a homemaker after a seventeen year marriage that bore three children, little property, and a disparity in earning power).

498. *Behm*, 427 N.W.2d at 336. Marital misconduct may be considered in property distribution under the Ruff-Fischer guidelines. *Id.* at 337.

499. *Id. See* Briese v. Briese, 325 N.W.2d 245, 247 (N.D. 1982)(recognizing that homemakers' contributions deserve recognition in divorce settlements).

500. *Behm*, 427 N.W.2d at 337.

501. 438 N.W.2d 151 (N.D. 1989).

was a defense to a dram shop action.[502] Aanenson and Wolfgram were riding their motorcycles and along the way they stopped at four bars including The Lower 48, owned by Bastien.[503] At the four bars Aanenson and Wolfgram took turns ordering and buying drinks.[504] After the men left the Lower 48, riding their motorcycles in single file fashion, Wolfgram's motorcycle rear-ended Aanenson's.[505] The accident resulted in injury to Aanenson and he brought a dram shop action against Bastien (Lower 48).[506] The trial court granted defendant's motion for summary judgment and entered judgment.[507] Aanenson appealed the judgment.[508]

The North Dakota Supreme Court reversed and remanded the case,[509] holding that a "complicity" defense would "defeat the purpose of the dram shop act."[510] The court went against a majority of jurisdictions in this ruling including Iowa, Michigan, and Minnesota.[511] The court stated that it would be "an absurd result if alcoholic beverage dealers could avoid liability for illegal sales to intoxicated customers . . ." based upon a customary method of patrons' taking turns buying drinks.[512] Thus, the case was remanded for further proceedings pursuant to the ruling.[513]

DRIVING WHILE INTOXICATED

HOLTE V. STATE HIGHWAY COMM'R

In *Holte v. North Dakota State Highway Commissioner*,[514] the North Dakota State Highway Commissioner appealed a district court reversal of an administrative suspension of Arden Holte's driving privileges.[515] Holte was arrested for driving under the influence of intoxicating liquor, taken to a law-enforcement center for an intoxilyzer test, and denied an opportunity to consult with

502. Aanenson v. Bastien, 438 N.W.2d 151, 151-52 (N.D. 1989).
503. *Aanenson*, 438 N.W.2d at 152.
504. *Id.*
505. *Id.*
506. *Id.* Wolfgram was having trouble with his cycle. *Id.*
507. *Aanenson*, 438 N.W.2d at 151.
508. *Id.* The trial court determined that because Aanenson had purchased drinks for Wolfgram, he was a "non-innocent" third party and this "complicity" was a defense to a dram shop action in this state. *Id.*
509. *Id.*
510. *Id.* at 161. The purpose of the Dram Shop Act was to discourage sales to intoxicated persons and the possible disastrous consequences. *Id.*
511. *Aanenson*, 438 N.W.2d at 157, 161.
512. *Id.* at 156. The court stated that "the legislature intended the responsibility and liability for serving alcoholic beverages to an intoxicated person to fall on the merchant (the dram shop)." *Id.* at 157.
513. *Id.* at 161.
514. 436 N.W.2d 250 (N.D. 1989).
515. Holte v. N.D. State Highway Comm'r, 436 N.W.2d 250, 251 (N.D. 1989).

an attorney before being given the intoxilyzer test.[516] After the test results were introduced as evidence in an administrative hearing, Holte's driving privileges were suspended for 364 days.[517] Holte appealed to the district court.[518] The trial court concluded that the arresting officer violated Holte's right to consult an attorney; the court reversed the administrative decision and ordered Holte's driving privileges be reinstated.[519]

The issue on appeal was whether the test results from a fairly administered intoxilyzer test were properly admitted into the civil administrative proceeding, even though Holte was not allowed to consult an attorney prior to administering the test.[520]

The supreme court distinguished another supreme court decision as involving the narrow issue of what constitutes a refusal to take a test and not the suppression of evidence.[521] There was no issue of refusal in *Holte*.[522]

The court refused to extend the exclusionary rule to civil proceedings for several reasons: the implied-consent law gathers reliable evidence of intoxication or nonintoxication;[523] the legislative directive to receive into evidence the results of fairly administered tests;[524] previous holdings that an affirmative refusal is necessary to withdraw consent;[525] the role of license suspension proceedings in protecting the public;[526] and constitutional protections of criminal procedures are not applicable in administrative license-suspension proceedings.[527] Thus, the district court erred in reversing Holte's

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516. *Holte*, 436 N.W.2d at 251. *See* N.D. CENT. CODE § 39-08-01 (1987 and Supp. 1989)(definition of driving under the influence of intoxicating liquor); § 39-20-01 (1987 and Supp. 1989)(chemical test for intoxication and implied consent).

517. *Holte*, 436 N.W.2d at 251. *See* N.D. CENT. CODE § 39-20-05 (1987 and Supp. 1989)(administrative hearing on request).

518. *Holte*, 436 N.W.2d at 251. *See* Kuntz v. State Highway Comm'r, 405 N.W.2d 285 (1987 and Supp. 1989)(judicial review).

519. *Holte*, 436 N.W.2d at 251. *See* Kuntz v. State Highway Comm'r, 405 N.W.2d 285 (N.D. 1987)(discussing right to consult an attorney before refusing to take intoxilyzer test).

520. *Holte*, 436 N.W.2d at 251.

521. *Id.* (citing Kuntz, 405 N.W.2d at 286, n.1).

522. *Holte*, 436 N.W.2d at 251. *See* N.D. CENT. CODE § 39-20-04 (1987 and Supp. 1989)(providing that no test is allowed if a person refuses). *See also, e.g.*, State v. Solbert, 381 N.W.2d 197 (N.D. 1986)(an affirmative refusal is required to withdraw implied consent).

523. *Holte*, 436 N.W.2d at 252 (quoting Asbridge v. N.D. State Highway Comm'r, 291 N.W.2d 739, 750 (N.D. 1980)).

524. *Holte*, 436 N.W.2d at 252. *See* N.D. CENT. CODE § 39-20-07 (1987 and Supp. 1989)(providing that the results of a fairly administered test must be received in evidence in any proceeding arising out of act alleged to have been committed by a person driving while under the influence of intoxicating liquor).

525. *Holte*, 436 N.W.2d at 252.

526. *Holte*, 436 N.W.2d at 252 (citing Williams v. N.D. State Highway Comm'r, 417 N.W.2d 359, 360 (N.D. 1987)(quoting Asbridge, 291 N.W.2d at 750)).

527. *Holte*, 436 N.W.2d at 252 (citing Holen v. Hjelle, 396 N.W.2d 290 (N.D. 1986)); *see also* Westendorf v. Iowa Dep't of Transp., 400 N.W.2d 553, 557 (Iowa, 1987)(the benefit of using reliable information of intoxication in license revocation hearings outweighs the

driving suspension because Holte was not allowed to consult an attorney before he submitted to the intoxilyzer test.[528] The judgment was reversed.[529]

STATE V. DRESSLER

In *State v. Dressler*,[530] the state appealed a county court order granting Nick Dressler's motion to suppress the results of blood and breath tests taken after he was arrested for driving under the influence of alcohol in violation of section 39-08-01 of the North Dakota Century Code.[531] When arrested, Dressler requested that blood samples be drawn at the Richardton Community Hospital located a few hundred yards away.[532] Instead, the arresting officer informed Dressler that the hospital in Richardton had refused to draw blood samples in the past and transported him twenty-three miles to Dickinson for testing.[533] The state appealed the suppression of the test results contending that Dressler had not been prevented from obtaining his own test, but rather that he was required to submit to the officer's test first.[534]

The supreme court noted that section 39-20-02 allows motorists to obtain their own chemical test for determining blood alcohol content in addition to the one performed by the state.[535] The

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possible benefit of applying the exclusionary rule). *Contra*, Whisenhunt v. Dep't of Pub. Safety, 746 P.2d 1298 (Alaska, 1987).

528. *Holte*, 436 N.W.2d at 252.

529. *Id.* Justice Meschke dissented noting that in *Kuntz*, and in Bickler v. N.D. State Highway Comm'r, 423 N.W.2d 146 (N.D. 1988), the court recognized a defendant's qualified right to consult with counsel before taking a chemical test. Further, the Justice argued that the appeal was moot because Holte had negotiated a plea bargain, pled guilty to a second offense, and was sentenced. The issue was not a matter of great public interest so that it warranted an opinion without an actual controversy. *See* Rolette Education Ass'n v. Rolette Pub. School Dist., 427 N.W.2d 812 (N.D. 1988). (Meschke, J., dissenting. *Holte*, 436 N.W.2d at 252-54).

530. 433 N.W.2d 549 (N.D. App. 1988).

531. *State v. Dressler*, 433 N.W.2d 549 (N.D. App. 1988). *See* N.D. CENT. CODE § 39-08-01(1) (1987 and Supp. 1989)(providing in part that a person may not drive or actually control any vehicle on a highway if "[t]hat person has a blood alcohol concentration of at least ten one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving").

532. *Dressler*, 433 N.W.2d at 550-51.

533. *Id.*

534. *Id.* at 550.

535. *Id.* N.D. CENT. CODE § 39-20-02 (1987 and Supp. 1989) provides in part:

> The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer with all costs of an additional test or tests to be the sole responsibility of the person charged. The failure or inability to obtain an additional test by a person does not preclude the admission of the test or tests taken at the direction of a law enforcement officer.

The state contended that section 39-20-02 required the state to test before the person charged may obtain their own test. State v. Larson, 313 N.W.2d 750 (N.D. 1981). The

person arrested must be given a reasonable opportunity to secure the extra test, and what is reasonable may vary depending on the circumstances.[536] The location, time of day, and distance to the testing facility are factors to consider.[537] Further, although law enforcement officers need not assist or advise the person arrested, they must afford a reasonable opportunity for compliance.[538]

In this case Dressler's request was reasonable in view of the closeness of Richardton Hospital, the late-night arrest, and distance required to travel to Dickinson.[539] In addition, the officer gave misleading statements about Richardton Hospital, and the officer would have had ample time to perform the state's test if he had granted Dressler's request.[540] Thus, Dressler was deprived of a reasonable opportunity to exercise his statutory rights.[541]

Results of chemical tests may be suppressed when a motorist is not allowed his right to independent testing, therefore the lower court's order suppressing the results of the state's test was affirmed.[542]

STATE V. WRIGHT

In *State v. Wright*,[543] Robert L. Wright appealed from a conviction of driving with a blood alcohol content of 0.10%, pursuant to section 39-08-01 of the North Dakota Century Code.[544] The

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supreme court noted that this case did not support the state's contention. There was some support in other jurisdictions, however. *See* Huff v. State, 144 Ga. App. 764, 242 S.E.2d 361, 362-63 (1978)(state must perform test first before statutory rights to alternative test attach); Greenwood v. Dep't of Motor Vehicles, 13 Wash. App. 624, 536 P.2d 644, 646 (1975)(person must submit to or refuse test directed by law enforcement officer before having the right to choose own test).

536. *Dressler*, 433 N.W.2d at 550-51 (citing People v. Underwood, 153 Mich. App. 598, 396 N.W.2d 433, 444 (1986); Commonwealth v. Alano, 388 Mass. 871, 448 N.E.2d 1122, 1128 (1988)(what is reasonable may differ from locality to locality).

537. *Dressler*, 433 N.W.2d at 551. *See Alano*, 448 N.E.2d at 1128 (officer may not prevent a person's attempts to get another examination); State v. Rambousek, 358 N.W.2d 223 (N.D. 1984)(officer need not advise a person of the right to another test).

538. *Dressler*, 433 N.W.2d at 551.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Dressler*, 433 N.W.2d at 551-52. *See, e.g.*, State v. Hughes, 181 Ga. App. 464, 352 S.E.2d 643 (1987); People v. Underwood, 153 Mich. App. 598, 396 N.W.2d 443, 444 (1986). The court reaffirmed interpretation of "failure or inability to obtain an additional test" in section 39-20-02 of the North Dakota Century Code to mean a situation when an arrestee does not make an effort to where an independent sample can not be obtained. It does not constitute a "failure" nor an "inability" if a reasonable opportunity is not provided. *Dressler*, 433 N.W.2d at 552.

543. 426 N.W.2d 3 (N.D. 1988).

544. State v. Wright, 426 N.W.2d 3, 4 (N.D. 1988). *See* N.D. CENT. CODE § 39-08-01 (1987 and Supp. 1989)(providing, in part, that a person may not drive or be in actual control of any vehicle if "[t]hat person has a blood-alcohol concentration of at least ten one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving").

issue on appeal was the adequacy of the chain of custody of the defendant's blood-alcohol test results and whether or not the trial court erred in admitting the results into evidence.[545]

It is undisputed that the arresting officer failed to seal and label the blood sample as required by the state toxicologist.[546] Furthermore, the state did not offer testimony to set forth a chain of custody.[547] The supreme court concluded that the trial court erred in admitting the results of Wright's blood-alcohol test as evidence.[548] The court further found that substantial prejudice resulted from admitting the test results.[549] Thus, because the error was not harmless, the conviction was reversed.[550]

DRIVING UNDER THE INFLUENCE

EVANS V. BACKES

In *Evans v. Backes*,[551] Mark Evans appealed from a district court judgment affirming the results of an administrative hearing suspending his driving privileges.[552] Evans was arrested for driving under the influence of intoxicating liquor, taken to a law enforcement center for an intoxilyzer test, and taken to the Mandan Hospital for a blood test because his intoxilyzer samples were inadequate.[553] Evans requested to call his wife so that she could call an attorney, but the deputy refused, offering to call an attorney himself or to assist Evans in making a call.[554] When Evans became loud and uncooperative, the deputy determined that Evans had refused the blood test.[555]

At an administrative hearing, the officer found that Evans had refused to be tested and revoked his driving privileges for two years.[556] Evans appealed and the district court affirmed, conclud-

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545. *Wright*, 426 N.W.2d at 5.

546. *Id.*

547. *Id.* Chain of custody is established by testimony verifying that the blood tested was the same blood that was collected. *Id.*

548. *Id.* The court noted that the instant case presented an issue identical to that in State v. Nygaard, 426 N.W.2d 547 (N.D. 1988). *Id.*

549. *Wright*, 426 N.W.2d at 5-6 (citing State v. Micko, 393 N.W.2d 741, 746 (N.D. 1986)). *See* N.D.R. CRIM. P. 52(a)(providing that any error which does not affect substantial rights may be disregarded).

550. *Wright*, 426 N.W.2d at 6. Justice Meschke dissented, stating that the appropriate standard of review should be whether the trial court had abused its discretion and that such abuse had not occurred in *Wright*. *Id.* (Meschke, J., dissenting).

551. 437 N.W.2d 848 (N.D. 1989).

552. Evans v. Backes, 437 N.W.2d 848, 849 (N.D. 1989).

553. *Evans*, 437 N.W.2d at 849.

554. *Id.*

555. *Id.*

556. *Id.* *See* N.D. CENT. CODE § 39-20-05 (1987 & Supp. 1989)(administrative hearing on request).

ing that there was no evidence supporting Evans' claim that he was denied a reasonable opportunity to consult an attorney.[557]

On appeal to the supreme court, Evans relied on *Kuntz v. State Highway Commissioner*,[558] contending that the hearing officer failed to make a finding on whether he had been denied a reasonable opportunity to consult an attorney.[559]

The review of administrative decisions is pursuant to section 28-32-19 of the North Dakota Century Code.[560] The court determines "whether a reasoning mind could reasonably have determined that the facts or conclusions were supported by the weight of the evidence."[561]

The hearing officer recited conflicting testimony concerning Evans' request and did not mention the issue regarding an attorney in the conclusions of law; recitation of testimony does not equal finding of fact.[562] Further, it is not sufficient to merely determine whether the person refused to submit to the test because a person who was denied a reasonable opportunity to consult an attorney and refused the test did not refuse for the purposes of revoking a driver's license.[563] It cannot be argued that by finding a refusal to be tested the hearing officer implicitly found that a reasonable opportunity to consult an attorney was offered.[564] An agency is required to explicitly state its findings of fact and conclusions of law.[565] The failure to "draft a finding of fact on the critical issue of whether Evans was denied a reasonable opportunity to consult an attorney before deciding whether to submit to the blood test[s]" warranted reversing the judgment and remanding for proper findings.[566]

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557. *Evans*, 437 N.W.2d at 849.

558. 405 N.W.2d 285 (N.D. 1987). *See* Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 285 (1987).

559. *Evans*, 437 N.W.2d at 849.

560. *Id. See* N.D. CENT. CODE § 28-32-19 (1974 & Supp. 1989). The court in *Evans* outlines a three-step process: "(1) Are the findings supported by a preponderance of the evidence? (2) Are the conclusions of law sustained by the finding of fact? (3) Is the agency decision supported by the conclusions of law?" *Evans*, 437 N.W.2d at 849.

561. *Evans*, 437 N.W.2d at 849 (citing Falcon v. Williams County Social Service Bd., 430 N.W.2d 569, 571 (N.D. 1988)).

562. *Evans*, 437 N.W.2d at 850.

563. *Id.* (citing *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285, 288 (1987)).

564. *Evans*, 437 N.W.2d at 850.

565. *Id.* (citing N.D. CENT. CODE § 28-32-13 (1974)(findings of fact, conclusions and decision of an agency)).

566. *Id.* at 851. *See* Hystad v. Industrial Comm'n, 389 N.W.2d 590 (N.D. 1986)(remanded because of uncertainty about basis for decision); Kuhn v. North Dakota Pub. Serv. Comm'n, 76 N.W.2d 171, 177 (N.D. 1956)(remanded with instructions to prepare finding). *But see* City of Fargo v. Windmill, Inc., 350 N.W.2d 32 (N.D. 1984)(not remanded because underlying basis for decision revealed despite lack of findings); Northwestern Bell

LUBENOW V. NORTH DAKOTA STATE HIGHWAY COMMISSIONER

In *Lubenow v. N.D. State Highway Comm'r*[567] the issue was whether evidence obtained by a policeman in an unrelated "emergency" may be used to prosecute the defendant.[568] In December of 1987, Terry Schander witnessed Wayne Lubenow driving erratically and wandering from lane to lane.[569] Schander followed Lubenow and called the police, using the phone in his pickup.[570] Schander followed Lubenow until Lubenow pulled into the driveway of his home.[571] Schander then witnessed a series of events which included Lubenow lying down and walking around the car.[572] When police officer Olson arrived, he notified his dispatcher that there was a man down in the garage and he entered the garage to assist Lubenow.[573] Olson twice asked Lubenow if he wanted medical assistance, but Lubenow refused on both occasions.[574]

Olson then asked Lubenow to accompany him to his patrol car at which time police officer Volrath arrived.[575] The officers gave Lubenow a number of field sobriety tests, all of which he failed.[576] Lubenow refused to take an ALERT test.[577] The officers then placed Lubenow under arrest for drunk driving and asked him to submit to a blood test; he refused.[578] Lubenow's license was revoked pursuant to section 39-20-04 of the North Dakota Century Code.[579] Lubenow appealed the decision of the hearing officer and the sustaining district court decision to revoke his license.[580]

The North Dakota Supreme Court held that Olson's initial

Telephone Co. v. Hagen, 234 N.W.2d 841 (N.D. 1975)(absence of finding was negligible and remand not required).

567. 438 N.W.2d 528 (N.D. 1989).

568. Lubenow v. N.D. State Highway Comm'r, 438 N.W.2d 528, 531, 533 (N.D. 1989). *See* U.S. CONST. amend. IV (right to be free from unreasonable search and seizure is made applicable to the states by the fourteenth amendment).

569. *Lubenow*, 438 N.W.2d at 529.

570. *Id.*

571. *Id.*

572. *Id.*

573. *Lubenow*, 438 N.W.2d at 530.

574. *Id.* Olson smelled a strong odor of alcohol on Lubenow's breath. *Id.*

575. *Id.* After placing Lubenow in his patrol car, Olson asked Schander if Lubenow was the person he had witnessed driving the car. *Id.*

576. *Id.*

577. *Lubenow*, 438 N.W.2d at 530.

578. *Id.*

579. *Id. See* N.D. CENT. CODE § 39-20-04 (1987 & Supp. 1989)(revocation of driver's license upon refusal to submit to testing). A hearing was held on January 27, 1988, at which time the revocation of the license was upheld. *Lubenow*, 438 N.W.2d at 530. On April 20, 1988, district court upheld the decision. *Id.* at 531.

580. *Lubenow*, 438 N.W.2d at 531.

entry into the garage was proper and the search thereafter was reasonable; hence, the arrest was valid.[581] The court defined a search and seizure, within the protection of the fourth amendment, as an area where the person has an expectation of privacy.[582] Absent an exception, a warrant is required in these areas of expected privacy.[583] The "emergency doctrine" is one exception to the warrant requirement.[584] " 'There are exceptional circumstances in which . . . it may be contended that a magistrate's warrant for search may be dispensed with.' "[585] The supreme court indicated that, based on information received from Schander and his own observations, there was an immediate need for action by Olson.[586] Thus, there was a sufficient relationship between the search and the emergency. Consequently, the arrest was valid.[587] The district court decision was affirmed.[588]

DRUGS AND NARCOTICS

STATE V. CONNERY

In *State v. Connery*,[589] the North Dakota Supreme Court held that a defendant's statement to an officer regarding defendant's ownership of marijuana was admissible against him at trial.[590] Kevin Connery appealed a conviction of possession of a controlled substance.[591] Connery was convicted after marijuana was found on the ground around Connery's vehicle while Connery was being stopped for a speeding violation.[592] Connery made two statements to the officer that "just some marijuana" was in a box in the car when the officer had his service revolver drawn on Connery, and that he "threw it out" when asked about baggies of marijuana found on the ground around the patrol car when the officer

581. *Id.* at 533.

582. *Id.* at 531 (citing Katz v. United States, 389 U.S. 347 (1967)). The supreme court determined, in State v. Manning, 134 N.W.2d 91 (N.D. 1965), that a garage is a place where the owner has an expectation of privacy. *Lubenow*, 438 N.W.2d at 531.

583. *Id.* at 532.

584. *Id.* (citations omitted).

585. *Id.* (quoting Johnson v. United States, 333 U.S. 10, 14-15 (1947)).

586. *Lubenow*, 438 N.W.2d at 533. *See* People v. Mitchell, 39 N.Y.2d 173, —, 383 N.Y.S.2d 246, 248, 347 N.E.2d 607, 609, *cert. denied*, 426 U.S. 953 (1976)(set forth guidelines for application of the emergency doctrine). *Lubenow*, 438 N.W.2d at 533.

587. *Lubenow*, 438 N.W.2d at 533.

588. *Id.*

589. 441 N.W.2d 651 (N.D. 1989).

590. State v. Connery, 441 N.W.2d 651, 654 (N.D. 1989).

591. *Connery*, 441 N.W.2d at 652. *See* N.D. CENT. CODE § 9-03-23 (1987)(class A misdemeanor to possess more than one-half ounce and not less than one ounce of marijuana).

592. *Connery*, 441 N.W.2d at 652. Connery seemed to be hiding the bags and also a wooden box with marijuana. *Id.*

released Connery.[593]

Connery tried to suppress both the statements.[594] The trial court held that the first of the statements should be suppressed because Connery was in custody, and the lack of a *Miranda*[595] warning called for the suppression of the statement.[596] The second statement was deemed admissible by the trial court because Connery was told he could leave and was not in custody when the statement was made.[597]

The three issues addressed by the North Dakota Supreme Court were: 1) the trial court's refusal to dismiss the second statement; 2) the sufficiency of the evidence to sustain a guilty verdict; and 3) whether Connery's right to a speedy trial was violated.[598]

The supreme court initially noted that *Miranda* warnings are only required when a person is interrogated while in custody.[599] The court found that the questioning of Connery was more than a mere traffic stop because the officer drew his revolver, thus the first statement was suppressible because lack of a *Miranda* warning.[600] The court determined that the trial court did not err in not suppressing the second statement because it was made while Connery was returning to his car, and no reasonable person would have thought he was in custody.[601]

Upon reaching the second issue, the court concluded that there was sufficient evidence to sustain a guilty verdict.[602] Circumstantial evidence may be used to prove possession, and the court found that in this case the marijuana found on the ground by Connery's vehicle was sufficient evidence.[603]

The court found the six month delay between filing of the complaint and the start of the trial because the arresting officer was absent from the state did not constitute a violation of Con-

593. *Id.* Connery was not arrested, but the material found on the ground was submitted to the state's attorney and he was charged with possession. *Id.* at 653.

594. *Id.*

595. Miranda v. Arizona, 384 U.S. 436 (1966).

596. *Connery*, 441 N.W.2d at 653.

597. *Id.*

598. *Id.*

599. *Connery*, 441 N.W.2d at 654. The state did not present "public safety" exceptions to *Miranda* on appeal. *Id.* at 653 (citing New York v. Quarles, 467 U.S. 649 (1984)(*Miranda* need not apply if questions prompted by concern for public safety)). Connery did not argue the "fruit of the poisonous tree" doctrine. *Id.* (citing Oregon v. Elstad, 470 U.S. 298 (1985)(earlier unwarned statement taints subsequent admissions)).

600. *Id.* at 654.

601. *Id.* at 655.

602. *Id.*

603. *Connery*, 441 N.W.2d at 655 (citing State v. Morris, 331 N.W.2d 48 (N.D. 1989)).

nery's right to a speedy trial.[604]

The judgment of conviction was affirmed.[605]

STATE V. MICHLITSCH

In *State v. Michlitsch*,[606] DeVerne Michlitsch appealed her conviction of possession of marijuana with intent to deliver in violation of section 19-03.1-23(1) of the North Dakota Century Code.[607] Law enforcement officers obtained search warrants and searched two mobile homes, numbers 12 and 13.[608] When the defendant's mobile home (13) was searched, Ronald Zuraff, the tenant of 12, who often stayed there, was present.[609] Marijuana was found, Michlitsch returned, and both Michlitsch and Zuraff were arrested.[610] Officers found marijuana cigarette butts in her purse and a marijuana cigarette on her person.[611]

At trial, Zuraff pled guilty and testified that the marijuana found in Michlitsch's mobile home was his alone.[612] Michlitsch was found guilty of possession with intent to deliver and received a five-year suspended sentence.[613]

The issue on appeal was whether the trial court erred in refusing to give Michlitsch's requested affirmative defense instruction which provided that it is an affirmative defense to both crimes if the defendant has no knowledge of the presence of the drug or its identity.[614]

The State relied on *State v. Rippley*[615] and *State v. Morris*[616] in which the supreme court held that possession of a controlled substance with intent to deliver is a strict liability offense.[617] Fur-

604. *Connery*, 441 N.W.2d at 656. The court determined that there was no hint in the record that the delay by the state was an attempt to hinder Connery's defense. *Id.* (citing State v. Wunderlich, 338 N.W.2d at 658 (N.D. 1983)). To determine whether the right to a speedy trial was violated a balancing and weighing of four factors is involved: "length of delay, reason for delay, defendant's assertion of the right, and prejudice to the defendant." *Id.* (citing State v. Littlewind, 417 N.W.2d at 361 (N.D. 1987) and State v. Padgett, 410 N.W.2d at 143 (N.D. 1987)).

605. *Connery*, 441 N.W.2d at 656.

606. 438 N.W.2d 175 (N.D. 1989).

607. State v. Michlitsch, 438 N.W.2d 175, 175-176 (N.D. 1989). *See* N.D. CENT. CODE § 19-03.1-23(1) (1981 and Supp. 1989).

608. *Michlitsch*, 438 N.W.2d at 176.

609. *Id.*

610. *Id.*

611. *Id.*

612. *Michlitsch*, 438 N.W.2d at 176. The jury was instructed on possession with intent to deliver as well as simple possession. *Id.*

613. *Id.*

614. *Id.*

615. 319 N.W.2d 129 (N.D. 1982).

616. 331 N.W.2d 48 (N.D. 1983).

617. *Michlitsch*, 438 N.W.2d at 176. *See* State v. Rippley, 319 N.W.2d 129 (N.D.

ther, the court held that the crime of unlawful possession is also a strict liability offense, and the state does not have to prove intent or knowledge on the part of the defendant.[618] Michlitsch relies on *Morris* in which the Washington Supreme Court referred to simple possession as an "almost strict-liability" offense and establishes an affirmative defense.[619]

The North Dakota Supreme Court had not approved or disapproved of the affirmative defense instruction in *Morris* or *Rippley*, but concluded in *Michlitsch* that if the evidence so warrants and the defendant requests, an affirmative defense instruction is proper.[620] The court agreed that such a provision ameliorates the harshness of strict criminal liability for unknowing possession.[621]

A defendant is entitled to a jury "instruction based on a legal defense if there is evidence to support it."[622] Here, testimony of both defendants corroborated her theory, and Michlitsch requested the instruction.[623] Because the trial court's refusal was not harmless error, the court reversed the judgment and remanded for a new trial.[624]

Further, Michlitsch contended that admission of the evidence regarding the marijuana cigarette butts in her purse, the marijuana cigarette found on her person, and the two smoking devices with marijuana residue found in her mobile home violated rule 404(b) of the North Dakota Rules of Evidence.[625] The general rule is that evidence of other crimes is not admissible unless relevant

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1982)(possession with intent to deliver does not require proof of guilty knowledge); State v. Morris, 331 N.W.2d 48 (N.D. 1983)(reaffirming *Rippley*).

618. *Michlitsch*, 438 N.W.2d at 177 (citing *Morris*, 331 N.W.2d at 57).

619. *Michlitsch*, 438 N.W.2d at 177. *See* State v. Cleppe, 96 Wash.2d 373, 635 P.2d 438, 440-41 (1981), *cert. denied*, 456 U.S. 1006 (1982)(recognition of an affirmative defense to the crime of simple possession).

620. *Michlitsch*, 438 N.W.2d at 177. *Id.* at 178. The affirmative defense provision is an accommodation which recognizes that the Legislature intended possession of a controlled substance and possession with intent to deliver to be strict liability crimes but also considers the constitutional interests of the accused. The defendant has the burden of proving this affirmative defense by a preponderance of the evidence; the State is not required to prove the nonexistence of the defense beyond a reasonable doubt. *See, e.g.*, State v. Knittel, 308 N.W.2d 379, 383 (N.D. 1981); United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985); State v. Buttrey, 651 P.2d 1075, 1083 (1982)(recognizing the potential for a constitutional attack against strict liability offenses when a person possesses a controlled substance unwittingly).

Michlitsch, 438 N.W.2d at 178. *See* N.D. CENT. CODE § 12.1-01-03(3) (1985)(an affirmative defense must be proved by the defendant by a preponderance of the evidence); Patterson v. New York, 432 U.S. 197 (1977)(guilty knowledge is not an essential element of possession of a controlled substance or possession with intent to deliver).

621. *Id.*

622. *Michlitsch*, 438 N.W.2d at 179 (citing State v. Thiel, 411 N.W.2d 66, 67 (N.D. 1987)).

623. *Michlitsch*, 438 N.W.2d at 179.

624. *Id.*

625. *Id.* *See* N.D.R. EVID. 404(b) (other crimes, wrongs or acts).

for some purpose other than showing a criminal character.[626] However, evidence may be admissible when it arises out of the same transaction and provides a more complete picture of the relevant events.[627] Here, the evidence was used to enhance the understanding of the event and not to prove propensity.[628] To prevent undue prejudice, however, only as much of the related crimes as necessary should be admitted.[629]

Each item found was discovered almost contemporaneously with the search and arrest and each is relevant to the crimes charged.[630] As such, it did not seem to constitute evidence of other crimes.[631] Even if this evidence were subject to rule 404(b), it was admissible to show intent, knowledge, or absence of mistake.[632] The trial court did not abuse its discretion in refusing to exclude the evidence.[633]

On remand, the jury was to be instructed on the affirmative defense if Michlitsch so requested and the evidence warranted it.[634]

STATE V. RAYWALT

In *State v. Raywalt*,[635] a defendant convicted of delivery of a controlled substance was held not to have the standing to challenge a search of an apartment where he was a guest and that the warrantless search of the defendant was proper under the circumstances.[636]

Pursuant to a search warrant, police officers searched an apartment where Daniel Raywalt was present at a party.[637] Raywalt, who was on probation, was searched pursuant to a clause in his probation conditions and a recipe for methamphetamine

626. *Michlitsch*, 438 N.W.2d at 179 (citing State v. Micho, 383 N.W.2d 741, 743-744 (N.D. 1986)).

627. *Michlitsch*, 438 N.W.2d at 179 (citing United States v. Simpson, 709 F.2d 903, 907 (5th Cir.), *cert. denied*, 464 U.S. 942 (1983); State v. Biby, 366 N.W.2d 460, 463 (N.D. 1985)(quoting State v. Frye, 245 N.W.2d 878, 883 (N.D. 1976)).

628. *Michlitsch*, 438 N.W.2d at 180.

629. *Id.* (citing 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404 [10], at 404-77-404-80 (1988)).

630. *Michlitsch*, 438 N.W.2d at 180.

631. *Id.*

632. *Id.*

633. *Id.*

634. *Id.*

635. 444 N.W.2d 688 (N.D. 1989).

636. State v. Raywalt, 444 N.W.2d 688, 689 (N.D. 1989). The supreme court also found that any error in the jury instructions was harmless, and that the admission of a methamphetamine recipe was not an abuse of the trial court's discretion. *Id.* at 689-91.

637. *Raywalt*, 444 N.W.2d at 689.

was found.[638] Subsequently, Raywalt was arrested for delivering methamphetamine to Melissa Pankow at the party, which he admitted after he had been arrested.[639] Raywalt's motion to suppress the recipe and statements made to the police was denied and he was convicted of delivery of a controlled substance.[640] Raywalt appealed.[641]

Raywalt's first argument was that there was no probable cause to search the apartment and therefore the recipe and the statements were the results of an illegal search.[642] The supreme court noted that the State raised Raywalt's lack of standing and the burden was therefore on Raywalt that he had an expectation of privacy in the place searched.[643] The court found no showing by Raywalt that he did have standing and concluded that he failed to establish his standing to challenge the search.[644]

Raywalt contended that the search of his person was unreasonable.[645] The supreme court found that since the main purpose of the search was to ascertain whether Raywalt was violating the conditions of his probation, the search did not violate Raywalt's fourth amendment rights.[646]

Raywalt also argued that the recipe should not have been admitted into evidence by the trial court because his possession of the recipe was not relevant to whether or not the substance was delivered.[647] The supreme court found that the recipe was relevant to show the nature of the substance injected into Pankow by Raywalt.[648]

Raywalt contended that the jury instructions were flawed in that they did not require the jury to find that Raywalt delivered methamphetamine specifically, only that he delivered a controlled

638. *Id.*

639. *Id.*

640. *Id.* The State requested an extended sentence and after a hearing, Raywalt was sentenced to fifteen years imprisonment. *Id.*

641. *Id.*

642. *Raywalt*, 444 N.W.2d at 689.

643. *Id.* (citing State v. Benjamine, 417 N.W.2d 838, 839-40 (N.D. 1988)).

644. *Raywalt*, 444 N.W.2d at 689. Raywalt did not even file a reply brief in response to the State's argument. *Id.*

645. *Id.*

646. *Id.*

647. *Raywalt*, 444 N.W.2d at 690. Raywalt contended that under Rules 403 and 404(b) of the North Dakota Rules of Evidence, the recipe was not relevant to the issue of what substance was delivered, and that the probative value of the recipe was substantially outweighed by the danger of unfair prejudice. *Id.* *See* N.D.R. EVID. 403 (evidence may be excluded if value outweighed by unfair prejudice); N.D.R. EVID. 404(b) (evidence of other crimes not admissible to prove acting in conformity).

648. *Raywalt*, 444 N.W.2d at 690.

substance.[649] The supreme court determined that there was no difference between the information and the proof at trial.[650] Thus, although Raywalt proposed that the State cannot allege one theory and prove another, the supreme court found that the proposition was not applicable in this case.[651] The supreme court concluded that any error in the instructions were harmless since the instructions as a whole were sufficient to inform the jury of the law, and did not violate Raywalt's rights.[652]

Raywalt asserted that before the trial court found that Raywalt was a dangerous special offender and imposed an extended sentence, it should have required a presentence investigation.[653] The supreme court found that a court could extend a convicted offender's sentence under Section 12.1-32-09(4) of the North Dakota Century Code without a presentence report in extraordinary cases.[654] The supreme court noted that it is in the discretion of the trial court as to what constitutes an extraordinary case.[655] The supreme court found that Raywalt had several prior drug related convictions and that Raywalt had informed the trial court that he did not want a presentence report.[656] Therefore, no abuse of discretion by the trial court was evident.[657]

The judgment of conviction was affirmed.[658]

ELECTIONS

HUNTLEY V. TIMM

In *Huntley v. Timm*,[659] Thomas Huntley appealed from a dismissal of his challenge to the election of Mike Timm to the House of Representatives for the Fifth Legislative District in Minot.[660] Following the November 8, 1988 election, the Ward County Canvassing Board determined that Timm had won the election by a three vote margin.[661] The State Canvassing Board and the Secre-

649. *Id.*
650. *Id.* at 691.
651. *Id.*
652. *Raywalt*, 444 N.W.2d at 691. If the jury instructions were erroneous and affected the substantial rights of the accused, it would be grounds for reversal. *Id.* *See* N.D.R. CRIM. P. 52(a) (harmless error).
653. *Raywalt*, 444 N.W.2d at 692.
654. *Id.*
655. *Id.*
656. *Id.*
657. *Raywalt*, 444 N.W.2d at 692.
658. *Id.*
659. 435 N.W.2d 683 (N.D. 1989).
660. Huntley v. Timm, 435 N.W.2d 683, 683 (N.D. 1989).
661. *Huntley*, 435 N.W.2d at 683.

tary of State ordered a recount.[662] Five ballots were excluded during the recount because they were not initialed by an election official.[663] Of the five ballots, four were cast for Huntley and one for Timm.[664] Thus, the certified final count was 3,600 votes for Timm, 3,599 for Huntley.[665]

On appeal, Huntley contended that section 16.1-13-22 of the North Dakota Century Code, as amended in 1981, provides that stamped ballots are valid if initialed.[666] Timm contended that the statute was amended to codify *Morgan v. Hatch*,[667] providing "that a ballot is valid if there has been substantial compliance with the statutory requirement that it be both stamped and initialed.[668]

The North Dakota Supreme Court noted that it is empowered to review the interpretation of a statute.[669] Neither party nor the court found any helpful legislative history to consider.[670] However, there was precedent in case law requiring that ballots be both stamped and initialed.[671] As explained in an 1899 case, the rationale for the requirement was to give each voter the power to determine whether he had received an official ballot.[672] Substantial compliance with the endorsement requirement has been upheld.[673]

The requirement that a valid ballot must be endorsed with both an official stamp and initials is codified under section 16.1-15-01 of the North Dakota Century Code.[674] The supreme court noted that if the legislature had intended to change the require-

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662. *Id.*

663. *Id.* at 683-84.

664. *Id.* at 684.

665. *Id.* at 683.

666. *Id.* at 684. *See* N.D. CENT. CODE § 16.1-13-22 (1981 & Supp. 1989). Section 16.1-13-22 provides: "Failure to stamp and initial a ballot or ballot card in the proper place does not invalidate such ballot or ballot card, but a complete failure to stamp and initial a ballot or ballot card does invalidate the ballot or ballot card." Section 16.1-13-22 amended section 16-12-04 which provided: "Failure to stamp and initial a ballot in the proper place on the ballot shall not invalidate such ballot but a failure to stamp and initial a ballot at any place on the ballot shall invalidate the ballot." *Id.*

667. 274 N.W.2d 563 (N.D. 1979).

668. *Huntley*, 435 N.W.2d at 684. *See* Morgan v. Hatch, 274 N.W.2d at 563 (N.D. 1979)(providing for substantial compliance).

669. *Huntley*, 435 N.W.2d at 684 (citing Rocky Mountain Oil and Gas Assoc. v. Conrad, 405 N.W.2d at 279 (N.D. 1987)).

670. *Huntley*, 435 N.W.2d at 684.

671. *Id.* at 684-85. *See* Miller v. Schallern, 8 N.D. 395, 79 N.W. 865 (1899); Weber v. O'Connel, 55 N.D. 867, 215 N.W. 539 (1927); Torkelson v. Byrne, 68 N.D. 13, 276 N.W. 134 (1937); Kuhn v. Beede, 249 N.W.2d 230 (N.D. 1976).

672. *Huntley*, 435 N.W.2d at 685 (quoting *Miller*, 79 N.W. at 867-68).

673. *Id.*

674. *Huntley*, 435 N.W.2d at 685. *See* N.D. CENT. CODE § 16.1-15-01 (1981)(proving that a ballot shall be void and not counted if it is not endorsed with the official stamp and initials).

ments, it could easily have done so by amending this statute.[675] Instead, the court concluded that the 1981 amendment was intended merely to clarify that improper location of the endorsement would not invalidate the ballot.[676] Thus, a failure to stamp *or* initial would constitute a " 'complete failure to stamp and initial' " and void the ballot.[677]

The facts in *Huntley* indicate that election officials may have failed to advise each voter that their ballot would be invalidated if not endorsed.[678] Nevertheless, the voters were adequately apprised by the writing on each ballot, by posted voting instructions, and by a poster displayed at the polling places.[679]

The judgment was affirmed.[680]

EMINENT DOMAIN

AALUND V. WILLIAMS COUNTY

In *Aalund v. Williams County*,[681] a landowner's appeal of a county's "quick-take" of his property was held to be timely because the county had provided improper notice.[682] In 1984, Rick Aalund was orally offered, but rejected, approximately $1,000 by a Williams County Commission to purchase land for a county road.[683] Aalund received a document titled "Notice to Property Owners" and an "Offer to Purchase Easement" from the clerk of district court a few days later.[684] This document informed Aalund that $1,045 had been deposited with the clerk and included an offer of $1,045 to purchase the land for highway purposes.[685]

In 1987, Aalund noticed the county's claim to his land went to pay his property taxes.[686] Aalund hired an attorney who wrote a letter to the county informing it that Aalund planned to appeal the

675. *Huntley*, 435 N.W.2d at 685.
676. *Id.*
677. *Id.* at 685-86.
678. *Id.* at 686. *See* N.D. CENT. CODE § 16.1-13-22 (1981)(providing that each voter be informed of the endorsement requirement).
679. *Huntley*, 435 N.W.2d at 686.
680. *Id.* Surrogate Justice Pederson dissented, noting that ambiguous language, without the benefit of legislative history, should be construed in a manner that would avoid disenfranchisement of voters (Pederson, V., dissenting). *Id.*
681. 442 N.W.2d 900 (N.D. 1989).
682. Aalund v. Williams County, 442 N.W.2d 900, 900 (N.D. 1989). *See* N.D. CONST. art. I, § 16 (state may take property by depositing money with clerk of court).
683. *Aalund*, 442 N.W.2d at 900. The commissioner said he'd get back to Aalund after Aalund rejected the offer for his land. *Id.*
684. *Id.*
685. *Id.* Aalund signed a receipt for the office on January 7, 1985. *Id.*
686. *Id.*

taking of his property to the district court.[687] The county answered with a letter asserting the appeal was too late.[688]

In 1988, Aalund's second attorney filed a formal notice of appeal with the district court and the county moved to dismiss.[689] The district court dismissed Aalund's appeal, determining that the time to appeal had expired thirty days after Aalund had received the offer to purchase his land from the county.[690]

Aalund appealed the district court's decision, contending the notice sent by the county to Aalund did not comply with the constitutional and statutory requirements for "quick-take."[691]

The North Dakota Supreme Court found that to protect the rights of a landowner the appeal of "quick-take" procedures should be liberally construed.[692] The court held that section 24-01-22.1 of the North Dakota Century Code required that the notice provided to a landowner inform the landowner that his land was being taken.[693] The court found that the notice to Aalund was deficient in this manner; the appeal period did not begin to run.[694]

The county also argued that the formal notice of appeal filed by Aalund's second attorney was beyond the 30-day appeal period.[695] The court found the letter sent by Aalund's first attorney advising the county of Aalund's intent to the appeal was a valid notice of appeal under section 24-01-22.1 of the North Dakota Century Code.[696]

The supreme court reversed the district court decision and remanded for further proceedings.[697]

ADAMS V. CANTERRA PETROLEUM, INC.

In *Adams v. Canterra Petroleum Inc.*,[698] Adams appealed from a district court summary judgment that dismissed a trespass

687. *Aalund*, 442 N.W.2d at 901.
688. *Id.*
689. *Id.* The county contended that the 30-day appeal period had expired. *Id.*
690. *Id.*
691. *Id.* Aalund also argued that the notice sent by the county did not comply with due process requirements of the United States and North Dakota Constitutions. *Id.* The court did not deal with this issue because it found that the notice failed to comply with the statute. *Id.*
692. *Aalund*, 442 N.W.2d at 901. *See* N.D. CENT. CODE § 24-01-22.1 (Supp. 1989)(appeal procedures after the deposit for a taking has been made).
693. *Aalund*, 442 N.W.2d at 902.
694. *Id.*
695. *Id.* at 902-03.
696. *Id.* at 903.
697. *Id.*
698. 439 N.W.2d 540 (N.D. 1989).

claim against Canterra.[699] Golden Valley County owns and maintains a road across Adams' land and over Knutson Creek.[700] In 1980, Golden Valley agreed with Canterra's predecessor-in-interest, Al-Aquitaine Oil Company, to abandon an existing bridge and to install a new creek crossing and approach.[701] The work was completed without Adams' permission, and he subsequently blocked the crossing.[702] In 1984, Golden Valley County condemned a strip of Adams' land to reconstruct the 1980 crossing.[703] Adams accepted and cashed the warrant for damages.[704]

In May, 1986, Adams filed a complaint asking exemplary damages for the initial trespass.[705] Canterra answered that Adams knew about the construction, that the construction was performed for the county, and that Adams was fully compensated through the condemnation proceedings.[706] The issue on appeal was whether summary judgment was appropriate.[707]

Rule 56(e) of the North Dakota Rules of Civil Procedure provides that the party resisting the motion must set forth specific facts showing that there is a genuine issue for trial.[708] The movant must show that there is no dispute as to the material facts or the inferences drawn from undisputed facts and that these facts necessarily lead to a judgment as a matter of law.[709] The supreme court found that the facts in *Adams* were not disputed, but these undisputed facts did not justify a dismissal of the complaint as a matter of law.[710]

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699. Adams v. Canterra Petroleum, Inc., 439 N.W.2d 540, 541 (N.D. 1989).

700. *Adams*, 439 N.W.2d at 541.

701. *Id.*

702. *Id.*

703. *Id.*

704. *Adams*, 439 N.W.2d at 541. Damages were determined to be $454.70 for the value of the land and easements plus $500 for loss of profit and general damages. *Id.*

705. *Id.* at 541-42.

706. *Id.* Canterra argues that Adams had constructive, if not actual notice of the work. *Id.* n.3. However, the court has declared that statutory directions as to how notice is to be given must be strictly complied with when notice is relied on to sustain forfeiture or loss of rights. Cowl v. Wentz, 107 N.W.2d 697, 700 (N.D. 1961). *See* N.D. CENT. CODE § 24-05-11 (1978)(notice requirements); C.J.S. EMINENT DOMAIN § 215(a); 18 AM. JUR., EMINENT DOMAIN § 312.

707. *Adams*, 439 N.W.2d at 542.

708. *Id.* "Summary judgment is a procedure for promptly . . . disposing of a controversy without a trial if there is no dispute as to any material fact or the inferences to be drawn from undisputed facts or when only a question of law is involved." *Id.* (citing Thiele v. Lindquist & Vennum, 404 N.W.2d 52, 53-54 (N.D. 1987)).

709. *Adams*, 439 N.W.2d at 542. *See* N.D.R. CIV. P. 56(e)(an adverse party may not rest upon mere allegations or denials but must set forth specific facts showing a genuine issue). *See also*, Spier v. Power Concrete, Inc., 304 N.W.2d 68 (N.D. 1981)(party resisting the motion must present competent evidence); First Nat'l Bank of Hettinger v. Clark, 332 N.W.2d 264, 267 (N.D. 1983)(trial court has no obligation to search for evidence opposing the summary judgment motion).

710. *Adams*, 439 N.W.2d at 453. *See* N.D.R. CIV. P. 56; Northwestern Equipment Inc.

There was no evidence presented to the trial court on the issue of whether the 1984 condemnation award was intended to cover the original 1980 entry and construction and the 1985 re-entry and reconstruction.[711] Condemnation proceedings must conform to the North Dakota Constitution and North Dakota Century Code, both of which require that private property can not be taken or damaged for public use without first compensating the owner.[712] Further, no mention was made in the condemnation award of an allowance for interest covering the time between the initial entry and the condemnation.[713] Thus, the court did not presume that the 1984 award was curative of the 1980 taking.[714]

The court had not previously considered whether an independent action for damages resulting from prior trespasses were included in an eminent domain compensation award.[715] Adams relied on a Kansas case in which the appellate court concluded that a condemnation award did not preclude bringing a trespass action, and the injured land owner was entitled to receive at least nominal damages.[716] The supreme court agreed.[717]

Other issues remained to be decided on remand.[718] Canterra argued that its predecessor-in-interest was not trespassing because it received authority from the county.[719] Even if Canterra was acting as an agent of Golden Valley, a fact not admitted or denied, Canterra was still responsible for its acts when wrongful in nature,

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v. Badinger, 403 N.W.2d 8, 9 (N.D. 1987)(summary judgment is not appropriate if the movant is not entitled to judgment as a matter of law [citing Krueger v. St. Joseph's Hospital, 305 N.W.2d 18, 22 (N.D. 1981)] even if the adverse party fails to respond by filing proof (citing Rice v. Chrysler Motors Corp., 198 N.W.2d 247, 252 (N.D. 1972)).

711. *Adams*, 439 N.W.2d at 543.

712. *Id.*

713. *Id.* at 543-44. *See* Square Butte Elec. Corp. v. Hilken, 244 N.W.2d 519 (N.D. 1976); N.D. CONST. art. I § 16; N.D. CENT. CODE § 32-15001(2) (1976).

714. *Adams*, 439 N.W.2d at 544. When property has been taken without compensation first, interest should be awarded from the time of the taking (citing Lineburg v. Sandven, 74 N.D. 364, 21 N.W.2d 808, 814 (1946)).

715. *Adams*, 439 N.W.2d at 544. *See* N.D. CENT. CODE § 24-05 (providing procedures for condemnation).

716. *Adams*, 439 N.W.2d at 544. *See* Lang v. Basin Elec. Power Co-op, 274 N.W.2d 253 (N.D. 1979)(case of a landowner suing a condemnor for trespass differentiated from *Adams* because of the existence of an original judgment and order of possession). *See* Annotation, *Condemnation-Suit or Prior Trespass*, 33 A.L.R. 3d 1132, 1134 (1970)(award does not bar an action for prior trespass).

717. *Adams*, 439 N.W.2d at 545 (discussion Grainland Farms v. Arkansas Louisiana Gas, 11 Kan.App.2d 402, 722 P.2d 1125 (1986)(damages for the taking are based on the value of the property before and after the taking, but a landowner may suffer damages from a trespass which would not be compensated as part of the taking)). *See* City of Hazelton v. Daughtery, 275 N.W.2d 624, 627-28 (N.D. 1979)(defining fair market value in condemnation cases).

718. *Adams*, 439 N.W.2d at 546.

719. *Id.*

such as an intentional act of trespass.[720]

The summary judgment was reversed, and the case remanded for further proceedings.[721]

EMOTIONAL DISTRESS

MUCHOW V. LINDBLAD

In *Muchow v. Lindblad*,[722] Virginia Muchow's parents and family appealed from a summary judgment dismissing their claim for negligent or intentional infliction of emotional distress against Fargo Police Department Detective James Lindblad and the City of Fargo.[723] The family alleged that Lindblad had failed to conduct a serious investigation of Virginia's death and had given them false information about the incident causing them severe emotional anxiety and physical symptoms of weight loss and loss of sleep.[724] Summary judgment for the defendants was granted when the court concluded that: 1) the plaintiffs' physical symptoms did not meet the requirement of bodily harm required to recover for negligent infliction of emotional distress; and 2) the plaintiffs did not establish two of the threshold requirements for intentional infliction of emotional distress — extreme and outrageous conduct by the defendant, coupled with severe emotional distress by the plaintiffs.[725]

On appeal, the plaintiffs asserted that physical manifestation of bodily harm was not necessary to establish negligent infliction of emotional distress because of the "deceased person" exception; that physical manifestation was not required under the minority rule; that Lindblad's conduct met the required standard for intentional infliction of emotional distress.[726]

The supreme court noted that the well-established standard of review for summary judgments applied.[727] Reviewing precedent, the court noted that it has allowed damages for emotional distress as a "constituent element" of other damages, but had not previ-

720. *Id.* *See* N.D. CENT. CODE § 3-04-02(3) (1987)(providing for an agent's personal responsibility when his acts are wrongful); Wills v. Schroeder Aviation, Inc., 390 N.W.2d 544, 547 (N.D. 1986)(holding an individual responsible for his own torts).

721. *Adams*, 439 N.W.2d at 547.

722. 435 N.W.2d 918 (N.D. 1989).

723. Muchow v. Lindblad, 435 N.W.2d 918, 919 (N.D. 1989).

724. *Muchow*, 435 N.W.2d at 919.

725. *Id.* at 920.

726. *Id.*

727. *Id.* See N.D.R. CIV. P. 56(c) (summary judgment will be granted only if, viewing the evidence most favorable to the party against whom it is sought, there is no genuine issue of material fact and the party seeking summary judgment is entitled to judgment as a matter of law).

ously analyzed the elements required for an independent action for either negligent or intentional infliction of emotional distress.[728]

A majority of jurisdictions follow section 436A of the Restatement (Second) of Torts requiring physical impairment, physical pain, or illness to recover for negligent infliction of emotional distress.[729] In *Muchow*, the plaintiff's physical harm was "transitory and inconsequential" and, therefore, not "bodily harm."[730] Plaintiffs contended that emotional distress was presumed in the "unusual circumstances" exception to the requirement of bodily harm.[731] However, the recognized exceptions have arisen in telegraph and funeral home cases and are based respectively on a contractual duty or the common law rule that any unwarranted interference with the right to burial is actionable.[732] These cases are inapplicable to *Muchow*.[733]

Moreover, the supreme court declined to adopt the minority "trend" and abolish the bodily harm requirement.[734] Even in these cases most jurisdictions have required "serious" or "severe" emotional distress, and this was not established in *Muchow*.[735]

With regard to a claim for intentional infliction of emotional distress, the degree of outrageousness may be important evidence of severe emotional distress.[736] Such conduct is narrowly limited to that which exceeds " 'all possible bounds of decency.' "[737] Lind-

728. *Muchow*, 435 N.W.2d at 920 n.3, 921. *See, e.g.*, Sadler v. Basin Elec. Power Co-op, 409 N.W.2d 87 (N.D. 1987); Thiele v. Lindquist & Vennum, 404 N.W.2d 52 (N.D. 1987). *See* Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982)(historical development).

729. *Muchow*, 435 N.W.2d at 921. Section 436A of the Restatement (Second) of Torts provides:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

RESTATEMENT (SECOND) OF TORTS § 436A (1965). Bodily harm is defined as "any physical impairment of the condition of another's body, or physical pain or illness." RESTATEMENT (SECOND) OF TORTS § 15 (1965).

730. *Muchow*, 435 N.W.2d at 922. Bodily harm may be caused by emotional distress. *Id.* at 921 (citing Payton v. Abbott Labs, 437 N.E.2d 171 (Mass 1982)).

731. *Id.* at 922. *See* RESTATEMENT (SECOND) OF TORTS § 313 comment a (1965)(providing the conduct must result in "bodily harm or any other invasion of the other's interests").

732. *Muchow*, 435 N.W.2d at 922-23.

733. *Id.* at 923.

734. *Id. See, e.g.*, St. Elizabeth Hospital v. Garrard, 730 S.W.2d 649 n.3 (Tex. 1987)(dispensing with bodily harm requirement).

735. *Muchow*, 435 N.W.2d at 923.

736. *Id.* at 924. RESTATEMENT (SECOND) OF TORTS § 46 comments j, k notes (elements of the tort: 1) extreme and outrageous conduct that is 2) intentional or reckless and that cause 3) severe emotional distress).

737. *Muchow*, 435 N.W.2d at 924.

blad's conduct may have been negligent, inconsiderate, and unkind, but it was unlikely that reasonable persons would find that it attained the level necessary to sustain an action for intentional infliction of emotional distress.[738]

The judgment was affirmed.[739]

EMPLOYER'S LIABILITY

BENJAMIN V. BENJAMIN

In *Benjamin v. Benjamin*,[740] the issue was whether summary judgment was appropriate in a negligence case where the plaintiff assumed risk.[741] Clifford Benjamin instructed his son, James Benjamin, to replace shovels on the plow with attached spikes.[742] While attempting to remove the shovel, James discovered a bolt that was an inch too long, and he used a hammer to straighten the bolt.[743] While striking the bolt, a piece of steel struck and injured James's eye.[744] James sued Clifford for negligence.[745] Clifford moved for summary judgment claiming there were no issues of fact.[746] James claimed issues of fact existed as to whether he was an employee and whether Clifford was negligent in not supplying adequate eyewear.[747] The trial court granted summary judgment.[748]

The North Dakota Supreme Court noted that, even if more than one inference could reasonably be drawn creating a question of fact for a jury, the "resolution of the issue of negligence is dispositive. . . ."[749] The court then considered whether negligence applied in the case.[750] The court stated that installing a bolt of the

738. *Muchow*, 435 N.W.2d at 924-25. *See* Hanke v. Global Van Lines, Inc., 533 F.2d 396 (8th Cir. 1976)(distinguished as outrageous because of repeated false assurances).

739. *Muchow*, 435 N.W.2d at 925.

740. 439 N.W.2d 527 (N.D. 1989).

741. Benjamin v. Benjamin, 439 N.W.2d 527, 527, 529 (N.D. 1989).

742. *Benjamin*, 439 N.W.2d at 527.

743. *Id.*

744. *Id.*

745. *Id.* The negligence action was based on the use of a wrong-sized bolt and failure to supply adequate eyewear. *Id.*

746. *Benjamin*, 439 N.W.2d at 527.

747. *Id.*

748. *Id.*

749. *Id.* at 528. The evidence must be looked at in a light most favorable to the party against whom summary judgment is sought. *Id.* He or she must be given the benefit of the doubt to all favorable inferences. *Id.* (citing Garcia v. Overvold Motors, Inc., 351 N.W.2d 110 (N.D. 1984).

750. *Benjamin*, 439 N.W.2d at 528. "[Q]uestions of negligence, . . . are questions of fact for the jury . . . unless evidence is such that reasonable people can draw one conclusion therefrom." *Id.* (citing Priel v. R.E.D., Inc., 392 N.W.2d 65 (N.D. 1986)(citations omitted).

wrong length did not constitute negligence.[751] However, failing to provide adequate eyewear may have been negligent, but that did not dismiss the fact that James assumed the risk, which was evident from James's deposition.[752] The court affirmed the summary judgment based on the fact that James was aware of the dangers in not using protective eyewear.[753] Thus, the judgment of the district court was affirmed.[754]

ENTRAPMENT

CITY OF MANDAN V. WILLMAN

In *City of Mandan v. Willman*[755] the issue was whether a jury instruction on entrapment and excuse should have been allowed for the strict liability offense of driving under revocation.[756] A police officer noticed Michael Willman pull away from a loading ramp of a motorcycle shop, driving a pickup with a motorcycle aboard.[757] The police, suspecting the motorcycle was stolen, turned on his interior lights and recorded Willman's license plate number.[758] Willman interpreted the officer's actions as a signal to move his truck, and when he drove the pickup onto the highway, the officer stopped him.[759] The officer discovered Willman's license had been revoked.[760] Willman was charged with driving under revocation in violation of a city ordinance.[761] He was found guilty by a jury and he appealed, claiming that the trial court should have allowed his jury instruction on entrapment and excuse.[762] The city claimed that because Willman drove in the parking lot before reacting to the officer's actions, Willman committed the offense before the alleged entrapment occurred, hence defenses of entrapment and excuse were inapplicable.[763]

The North Dakota Supreme Court noted that to rely upon the

751. *Benjamin*, 439 N.W.2d at 528.
752. *Id.* at 529. *See* Kittock v. Anderson, 203 N.W.2d 522 (N.D. 1973)("record shows, without contradiction, that plaintiff was fully aware of the danger . . . reasonable men cannot disagree on the question of his assumption of risk. . .").
753. *Benjamin*, 439 N.W.2d at 529.
754. *Id.* at 530.
755. 439 N.W.2d 92 (N.D. 1989).
756. City of Mandan v. Willman, 439 N.W.2d 92, 93 (N.D. 1989).
757. *Willman*, 439 N.W.2d at 92.
758. *Id.*
759. *Id.* Willman interpreted the officer's hand movements as a signal or command to move. *Id.* at 93.
760. *Id.* at 93.
761. *Willman*, 439 N.W.2d at 93.
762. *Id.* The North Dakota Supreme Court has allowed assertion of affirmative defenses in cases of strict liability. State v. Michlitsch, 438 N.W.2d at 93.
763. *Willman*, 439 N.W.2d at 93.

theory of entrapment, Willman must prove that the officer induced the commission of the crime.[764] In determining whether the jury should have been instructed on entrapment, the court must "view the evidence in a light most favorable to defendant."[765] Willman was convicted of violating a city ordinance that was written similar to a statute in section 39-06-42 of the North Dakota Century Code.[766] The ordinance stated that "any person who drives a motor vehicle on a highway or on public or private areas to which the public has right of access for vehicular use . . . while that person's license . . . is suspended or revoked is guilty of a class B misdemeanor."[767]

The supreme court stated that there was no doubt that Willman drove in the parking lot and that his driving occurred prior to police involvement.[768] Therefore, the court concluded there was no entrapment.[769]

Furthermore, the court reasoned that the only disputed issue was whether the parking lot was a public or private lot that was open to public use.[770] This was a question of fact to be determined by the jury and neither party claimed that the trial court erred in its ruling.[771] As to the jury instruction on excuse, the supreme court dismissed Willman's allegation because, like the matter of entrapment, Willman committed an offense before police involvement.[772] Thus, the decision of the trial court was affirmed.[773]

EXECUTORS AND ADMINISTRATORS

MATTER OF ESTATE OF STARCHER

In *Matter of Estate of Starcher*,[774] an attorney's claim for legal fees and costs against an estate was upheld and was found not to require a Rule 54(b) certification, not barred by res judicata, and the oral contract between the attorney and client was held not

764. *Id. See* N.D. CENT. CODE § 12.1-05-11(2) (1985)(entrapment occurs "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit an offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.").

765. *Willman*, 439 N.W.2d at 93.

766. *Id. See* N.D. CENT. CODE § 39-06-42(1)(1987)(it is a class B misdemeanor to drive while license is revoked).

767. *Id.* N.D. CENT. CODE § 39-06-42(1)(1987).

768. *Id.* at 94.

769. *Willman*, 439 N.W.2d at 94. The supreme court found that the officer's actions did not induce Willman's illegal conduct, but prompted yet another offense. *Id.*

770. *Id.*

771. *Id.*

772. *Id.*

773. *Id.*

774. 447 N.W.2d 293 (N.D. 1989).

subject to the statute of frauds.[775]

Robert Baird had a claim for legal fees and costs incurred in Hattie Starcher's contest of Emil Ridl's will.[776] After Ridl's death, two wills were submitted for probate.[777] Starcher was the main beneficiary of the first will which named Baird as personal representative.[778] The second will disinherited Starcher, and was subsequently found valid and admitted to probate.[779] Baird alleged that Starcher had orally agreed to pay him a fee, and pursuant to statute, petitioned Ridl's estate for his expenses incurred in the contest of the will, amounting to $20,506.44.[780] The county court awarded Baird $3,000 from Ridl's estate.[781]

After Starcher died, Baird submitted a claim against Starcher's estate for the remaining amount and the county court ruled against Baird, finding that the claim was barred by res judicata.[782] Baird appealed to the North Dakota Supreme Court.[783]

The supreme court noted that an order determining one, but not all, of one creditor's claims against an estate is not appealable in an unsupervised administration without a Rule 54(b) certification.[784] The court found that Baird's appeal was properly before the court since Baird had only one claim against Starcher's estate and did not need a Rule 54(b) certification.[785]

The supreme court concluded that the issue as to whether or not Starcher independently retained Baird was not considered by the county court in Baird's claim against Ridl's estate.[786] The supreme court determined that the trial court's award of $4,000 to Baird was for his work on Ridl's estate and not for his efforts on behalf of Starcher.[787] The supreme court found that the first award to Baird was not res judicata as to his claim against Starcher's estate and remanded to the county court to determine

775. Matter of Estate of Starcher, 447 N.W.2d 293, 294-97 (N.D. 1989).
776. *Starcher*, 447 N.W.2d at 294.
777. *Id.*
778. *Id.*
779. *Id.*
780. *Id.* *See* N.D. CENT. CODE § 30.1-18-20 (1987)(personal representative entitled to necessary expenses if defends or prosecutes a proceeding in good faith).
781. *Starcher*, 447 N.W.2d at 295.
782. *Id.*
783. *Id.*
784. *Id.* In an unsupervised administration, each proceeding involving the same estate is treated independent of each other, and finality requires a concluding order on each petition. *Id.* at 295. In a supervised administration, the court has continuing authority over the administration and settlement of a decedents estate, until an order approving distribution is made. *Id.*
785. *Id.* at 296.
786. *Starcher*, 447 N.W.2d at 296.
787. *Id.*

whether or not there was an oral agreement between Starcher and Baird.[788]

The court also found that the alleged contract between Starcher and Baird did not violate the statute of frauds because it could have been performed within one year.[789] Additionally, the supreme court determined that Starcher's declarations about the existence of the alleged contract were not hearsay since they were offered to prove the existence of the agreement and not offered to prove the truth of the matter asserted.[790]

The order of the county court was reversed and remanded.[791]

FAMILY LAW

LONG V. LONG

In *Long v. Long*,[792] the issue was whether a North Dakota district court has subject matter jurisdiction to modify child custody when the family no longer resides in North Dakota.[793] In August of 1979, Jeffrey Long was given reasonable visitation rights to his children after his divorce from Kathy A. Long.[794] Kathy and the children moved to Minnesota.[795] In 1985, Jeffrey, who had left North Dakota in 1980, brought an action in North Dakota against Kathy for not allowing him visitation of his children.[796] The trial court declared that it had subject matter jurisdiction and allowed Jeffrey visitation.[797]

At that time, neither party contested the court's jurisdiction to modify the decree.[798] After Kathy again refused visitation, Jeffrey sought modification and requested custody of the children.[799] Kathy requested a stay of the proceedings and questioned the district court's jurisdiction.[800] Kathy filed a motion in Minnesota

788. *Id.* The court additionally noted that compensation agreements between attorney and client should be construed most strongly against the attorney. *Id.* at 297.

789. *Id. See* N.D. CENT. CODE § 9-06-04 (1987)(statute of frauds).

790. *Starcher*, 447 N.W.2d at 297. *See* N.D.R. EVID. 801(c) (hearsay is a statement made to prove the truth of the matter asserted).

791. *Starcher*, 447 N.W.2d at 297.

792. 439 N.W.2d 523 (N.D. 1989).

793. Long v. Long, 439 N.W.2d 523, 523 (N.D. 1989).

794. *Long*, 439 N.W.2d at 523.

795. *Id.*

796. *Id.* Kathy Long claimed Jeffrey sexually abused the children, and she requested that the court deny Jeffrey visitation. *Id.*

797. *Id.*

798. *Long*, 439 N.W.2d at 523.

799. *Id.* Jeffrey Long requested that the court allow him to move the children to Mississippi. *Id.*

800. *Id.*

requesting the court to assume jurisdiction.[801] Kathy's motion was denied, and Minnesota declined to override North Dakota's jurisdiction.[802] In May of 1988, the Northeast Central District Court once again granted Jeffrey visitation rights, and Kathy appealed.[803]

The North Dakota Supreme Court noted that this was an interstate custody dispute with jurisdiction pursuant to the Parental Kidnapping Prevention Act (PKPA) and the Uniform Child Custody Jurisdiction Act (UCCJA).[804] Under these acts a court has continuing jurisdiction to modify a decree if the child or a contestant lives in the state.[805] Since none of the parties, including the Long children, had resided in North Dakota since 1980, the supreme court found that North Dakota no longer had jurisdiction to modify the custody decree.[806] Jeffrey Long contended that even if North Dakota did not have jurisdiction under the acts, it had jurisdiction because Minnesota deferred to North Dakota's jurisdiction.[807] The supreme court disagreed and cited authority which held that subject-matter jurisdiction cannot be changed by "agreement, consent or waiver."[808] The court noted that PKPA and UCCJA specifically set forth jurisdictional requirements and did not allow jurisdiction by agreement or consent.[809] Therefore, the Minnesota court's consent to North Dakota's jurisdiction did not give North Dakota jurisdiction.[810]

Finally, Jeffrey Long argued that certain provisions of PKPA and UCCJA grant North Dakota jurisdiction.[811] Regarding PKPA

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801. *Id.* at 523-24. Kathy Long requested that the Minnesota court award her sole legal and physical custody. *Id.* at 524.

802. *Long*, 439 N.W.2d at 524.

803. *Id.*

804. *Id.* *See* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(d) (1982)("[J]urisdiction of State . . . continues to be met and such State remains the residence of the child or of any contestant."); N.D. CENT. CODE ch. 14-14-03(1) (1971)(Uniform Child Custody Jurisdiction Act; a court will have subject matter jurisdiction if: 1) the state is the home of the child at the time of the action, and 2) the state has been the child's home state within six months of the proceeding and the child was removed by one party and one party continues to live in the state).

805. *Long*, 439 N.W.2d at 524 (citing Dahlen v. Dahlen, 393 N.W.2d 765, 767 (N.D. 1986)(interpretation of the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction Act).

806. *Long*, 439 N.W.2d at 524-25.

807. *Id.* at 525.

808. *Id.* (citing State v. Tinsley, 325 N.W.2d 177, 179 (N.D. 1982)).

809. *Long*, 439 N.W.2d at 525.

810. *Id.*

811. *Id.* at 525-26. *See* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(c)(2)(D)(1982)(grants one state jurisdiction when another state declines jurisdiction on the grounds that the other state is a more appropriate forum to determine custody); Uniform Child Custody Jurisdiction Act, N.D. CENT. CODE § 14-14-03(1)(d)(1)(1971)(North Dakota is a proper forum when another state declines jurisdiction on the grounds that North Dakota is the appropriate forum).

and UCCJA, the North Dakota Supreme Court gave two reasons why they did not apply in the present case.[812] First, the Minnesota court did not decide Minnesota was an inappropriate forum; rather it sought to avoid conflicts resulting from simultaneous proceedings in two states.[813] Second, North Dakota, for a variety of reasons, was not the most appropriate of the two states to decide custody.[814] The court determined that its decision would not leave the parties without a remedy.[815] Thus, the North Dakota Supreme Court vacated the second amended judgment and remanded with directions to deny modification.[816]

ROEN V. ROEN

In *Roen v. Roen*[817] the issue was whether the trial court had erred in its divorce decree in distribution of property, determination of spousal support, and determination of custody.[818] Bill and Suzanne Roen were married in 1971, and after a series of moves, the couple settled in Bismarck where Bill practiced medicine.[819]

The trial court reached a mutually agreeable property distribution of sixty-nine items. However, Bill appealed the decision regarding an additional 150 items, claiming that the distribution used was arbitrary.[820] The trial court also ordered Bill to pay spousal support of $2,000 per month for two years and, thereafter, $1,000 monthly, plus ten percent of his gross income over $100,000.[821] Bill appealed, claiming the spousal support should be temporary and to rehabilitate Suzanne.[822] Bill also asserted that the trial court had failed to end support in the case of Suzanne's

812. *Long*, 439 N.W.2d at 525-26.
813. *Id.*
814. *Id.* at 526. The supreme court stated that North Dakota was not the most appropriate forum because the state has maintained no connection with the parties, the parties resided outside of North Dakota, and Minnesota has the only connection with the children. *Id.*
815. *Id.* The North Dakota Supreme Court noted that the Minnesota court would exercise its jurisdiction if North Dakota determined that it did not have jurisdiction. *Id.*
816. *Id.*
817. 438 N.W.2d 170 (N.D. 1989).
818. *Roen v. Roen*, 438 N.W.2d 170, 171, 172, 173 (N.D. 1989).
819. *Roen*, 438 N.W.2d at 171. At the time of their marriage, Bill was an aeronautical engineer and Suzanne was a flight attendant. *Id.* The couple moved to Grand Forks in 1972 where Bill received a medical degree. *Id.* Pursuing Bill's medical career, the couple, in 1977, moved to Rochester, Minnesota; in 1981 they moved to Seattle; and in 1984, they moved to Bismarck. *Id.* Suzanne had a degree in sociology and worked as a stewardess, a travel agent, and a restaurant hostess before becoming a housewife shortly after the birth of their first child in 1980. *Id.*
820. *Roen*, 438 N.W.2d at 171. The 69 items were distributed based on an agreement whereby Suzanne divided the items that both or neither wanted and Bill chose one of the groups. *Id.*
821. *Id.* at 172.
822. *Id.*

death, remarriage, or cohabitation.[823] Regarding custody of Bill and Suzanne's two children, the trial court granted custody to Suzanne, and Bill appealed, claiming that he would provide a more stable environment for the children and, thus, he should be the custodial parent.[824]

In analyzing the issue of property distribution, the supreme court upheld the trial court's decision, stating that the determination was reasonable in light of the circumstances.[825]

Regarding spousal support, the court agreed with the trial court that Suzanne had suffered permanent economic loss by foregoing employment outside the home for several years and, therefore, she could never obtain as high a wage as if she had worked continuously.[826] Thus, the trial court was correct in awarding Suzanne spousal support after the two-year rehabilitation period.[827] The court was mostly concerned with the trial court's failure to specify an end to support in the event of Suzanne's death or remarriage; however, the court indicated that it was "unwilling to modify a lower court judgment for a deficiency first identified during the appeal."[828]

Concerning the child custody issue, the supreme court stated that " 'the best interests and welfare of the child' " are to be the guiding principles in determination of custody.[829] The supreme court stated that there was no overwhelming evidence in favor of either party. The trial court considered the best interests of the children in weighing all factors.[830] Therefore, the supreme court upheld the trial court's decision on all three issues.[831]

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823. *Id.*

824. *Roen*, 438 N.W.2d at 173-74. Because Suzanne planned to move out-of-state, Bill claimed that it would be in the children's best interest to remain in the same community. *Id.* at 173. Bill also submitted several articles to the effect that children of divorce do better living with the parent of the same sex. *Id.*

825. *Id.* at 171-72. "Generally, if evidence . . . supports the trial court's property division, it is not clearly erroneous and we do not disturb the division." *Id.* at 171 (citing Behm v. Behm, 427 N.W.2d 332, 337 (N.D. 1988)).

826. *Roen*, 438 N.W.2d at 172. Suzanne had no immediate income and had received little income-producing property in the settlement. *Id.* The supreme court noted that a lack of adequate retirement savings could be considered in awarding spousal support. *Id.*

827. *Roen*, 438 N.W.2d at 172-73. Uncertainty as to spousal support "dooms the divorced persons to meet again in the courtroom." *Id.* at 172. It is preferred that the court support limits in the decree, and "[a] trial court will act to terminate unlimited spousal support upon death or remarriage . . . unless there are extraordinary circumstances which justify its continuance." *Id.* at 173.

828. *Id.*

829. *Id.* (citing N.D. CENT. CODE § 14-09-06.1). "A trial court must consider and evaluate 'all factors affecting the best interests and welfare of the child. . . .' " *Id.* (citing N.D. CENT. CODE § 14-09-06.2 and Gravning v. Gravning, 389 N.W.2d 621 (N.D. 1986)).

830. *Roen*, 438 N.W.2d at 174.

831. *Id.* Suzanne requested attorneys' fees for the appeal and this issue was remanded to the trial court for determination. *Id.*

FORCIBLE ENTRY

FIREMAN'S FUND MORTGAGE CORP. V. SMITH

In *Fireman's Fund Mortgage Corp. v. Smith*,[832] Curtis Smith and Barbara Smith appealed from a judgment in an eviction action brought by Fireman's Fund Mortgage Corporation pursuant to chapter 33-06 of the North Dakota Century Code.[833] The summons and complaint were served on the Smiths on January 29, 1987, and a hearing was scheduled for February 17, 1987.[834] At the hearing, the Smiths alleged that the trial court lacked jurisdiction because more than fifteen days had elapsed between the summons and their appearance resulting in an illegal and improper eviction.[835] On February 19, the trial court concluded that it had jurisdiction and that Fireman's Fund was entitled to possession of the real property.[836]

On appeal, the Smiths asserted that the trial court lacked jurisdiction in an eviction action when the defendant was given a greater length of time to respond and appear than provided in the statute.[837] They argue that an eviction statute must be strictly construed.[838]

In *Perry v. Erling*,[839] the North Dakota Supreme Court recognized that a statute must be construed logically and not construed to render an absurd or unjust result.[840] The supreme court has held that a literal reading of statutes that would lead to absurd results should be avoided when the statutes can be reasonably construed in light of their purpose.[841] Section 1-02-01 of the North Dakota Century Code provides that statutes are to be construed liberally with a "view to effecting its object and to promoting justice."[842]

The supreme court held that in this case, strict construction of

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832. 436 N.W.2d 246 (N.D. 1989).

833. Fireman's Fund Mortgage Corp. v. Smith, 436 N.W.2d at 246, 246 (N.D. 1989). *See* N.D. CENT. CODE § 33-06-02 (Supp. 1989)(providing for not less than three nor more than fifteen days between the summons and the defendant's appearance in an eviction action).

834. *Smith*, 436 N.W.2d at 246.

835. *Id.*

836. *Id.*

837. *Id.*

838. *Smith*, 431 N.W.2d at 247.

839. 132 N.W.2d 889 (N.D. 1965).

840. *Id. See Perry*, 132 N.W.2d at 896 (court must construe a statute logically so as to avoid an absurd result)(quoting 82 C.J.S. STATUTES § 325 (1953)).

841. *Smith*, 436 N.W.2d at 247 (quoting Haggar v. Helvering, 308 U.S. 389, 394 (1940)).

842. *Smith*, 436 N.W.2d at 247. *See* N.D. CENT. CODE § 1-02-01 (1987)(providing a rule of construction for the code).

the statute would lead to injustice and absurdity.[843] When an extra four days was allowed to the defendants for responding or appearing in the eviction action and no detriment resulted, the district court was not deprived of its jurisdiction.[844] The judgment was affirmed.[845]

HOMICIDE

STATE V. FREY

In *State v. Frey*,[846] a defendant convicted of murder was held to have waived any right to instructions on lesser included offenses of murder when his defense counsel specifically objected to instructions on lesser offenses.[847]

Jeffrey E. Frey was convicted of murder and aggravated assault after one member of his hunting party was shot to death and another one sustained shooting injuries.[848] According to evidence presented by the state, Frey shot Douglas J. Bjornson to death and then fired shots into abandoned buildings and at trucks, with one shot ricocheting and hitting Scott Ottum in the head.[849] There were no eyewitnesses to the shooting incidents, and after other members of the hunting party took Ottum to the hospital, they discovered Frey in his pickup holding a shotgun.[850] Frey denied knowledge of Bjornson's death and Ottum's injuries.[851] At the trial, Frey's attorney requested an instruction on self-defense but objected to any instructions on lesser included offenses.[852] Frey was convicted of murder and aggravated assault, and he appealed his conviction to the North Dakota Supreme Court.[853]

Frey contended that the trial court erred in not instructing the jury on the lesser included offenses.[854] Frey contended that although his counsel objected to instructions on the lesser included offenses, these instructions could not be waived.[855] The supreme

843. *Smith*, 436 N.W.2d at 247.
844. *Id.* at 247-48.
845. *Id.*
846. 441 N.W.2d 668 (N.D. 1989).
847. State v. Frey, 441 N.W.2d 668, 671 (N.D. 1989).
848. *Frey*, 441 N.W.2d at 669.
849. *Id.*
850. *Id.* at 670.
851. *Id.*
852. *Id.* Frey's counsel at trial did not represent him on appeal. *Id.* at 670 n.1.
853. *Frey*, 441 N.W.2d at 670.
854. *Id.*
855. *Id.* On appeal, Frey relied on *State v. Leidholm*, in which the supreme court held that it is of necessity that there be an instruction on lesser included offenses when self-defense is raised. *Id.* at 670 n.2 (citing State v. Leidholm, 334 N.W.2d 811 (N.D. 1989)).

court determined that the defense had a responsibility to object to specific instructions.[856] The court noted that the waiving of instructions on lesser included offenses is a "trial tactic" and the defendant takes an "all-or-nothing" risk of being convicted on the greater offense.[857] The supreme court concluded that by objecting to instructions on lesser included offenses, Frey waived his right to those instructions and therefore the trial court did not err in not instructing the jury on the lesser included offenses.[858]

Frey also asserted that in order to be found guilty of murder, the State should have proved the absence of "extreme emotional disturbance for which there is reasonable excuse," pursuant to an amendment of Section 12.1-16-01(1) of the North Dakota Century Code.[859] The court did not agree, determining that Frey was charged with a class AA felony, and that the language of the amendment did not change the law as asserted by Frey.[860]

Next, Frey argued that there was insufficient evidence to find him guilty of murder and aggravated assault.[861] The court noted that the State presented substantial evidence indicating that Frey fired the shots that killed Bjornson and injured Ottum.[862] The supreme court found that the evidence of Bjornson's injuries were not consistent with Frey's self-defense argument.[863] The court determined that viewing the evidence in a light most favorable to the verdict, there was sufficient evidence to find Frey guilty of murder and aggravated assault.[864]

Frey's last argument was that by Frey's counsel waiving the instruction on lesser included offenses, he has given ineffective assistance of counsel under the Sixth Amendment of the United States Constitution.[865] The court was unable to determine from the record presented whether or not Frey's assistance of counsel was defective, and concluded that Frey may pursue his claim at a

856. *Id.*
857. *Id.*
858. *Frey*, 441 N.W.2d at 671.
859. *Id.* at 671-72. *See* N.D. CENT. CODE § 12.1-16-01(1) (1987)(definition of murder).
860. *Id.* The court held that the rationale of *State v. Dilger* was still applicable. *Id.* (citing State v. Dilger, 338 N.W.2d at 87 (N.D. 1983)).
861. *Frey*, 441 N.W.2d at 672.
862. *Id.* at 672-73.
863. *Frey*, 441 N.W.2d at 673. Bjornson had pellet wounds in his right buttock and on the back of his left leg. *Id.*
864. *Id.* The state presented overwhelming circumstantial evidence that Frey killed Bjornson and injured Ottum. *Id.* at 672-73. Such evidence included three shell casings from Frey's gun found in the area where Bjornson was shot. *Id.* Frey also made inconsistent statements to police officers. *Id.* at 673. The pellets taken from Bjornson and Ottum were shown to be the same as those taken from shells in Frey's gun. *Id.*
865. *Id.*

post conviction proceeding at which a satisfactory record can be developed.[866]

The judgment was affirmed.[867]

STATE V. TRANBY

In *State v. Tranby*,[868] Stanley Tranby appealed his conviction on two counts of negligent homicide, the denial of his motions for an acquittal and a new trial.[869] Tranby and Cindy Bauer, along with their two children and Tranby's son from a previous marriage, were camping.[870] At 8:30 p.m., they went for a ride in Tranby's boat.[871] Tranby had been drinking during the day and took alcoholic beverages with him on the boat.[872] At approximately 9:30 p.m., Tranby fell across the side of the boat, an act leading to a series of events which caused the boat to capsize.[873] Cindy and one child clung to the boat until rescued the next day. Tranby drifted with the other two children.[874] Tranby reached shore and summoned help, but both children drowned.[875]

Tranby was charged with two counts of negligent homicide for failing to have each child wear a personal floatation device, operating the boat in adverse water and weather conditions, operating the boat in poor lighting, and operating the boat while under the influence of alcohol.[876] The jury found Tranby guilty, and he was sentenced to serve two consecutive five-year terms at the State Penitentiary.[877]

On appeal, Tranby raised five issues.[878] First, he asserted that his failure to place each child in personal floatation devices was not evidence of criminal negligence. He asserted that such a requirement would violate his due process right to fair notice in that the applicable boat safety regulations require that one floatation device be aboard for each person.[879] The supreme court noted, however, that conduct need not be specifically prohibited in order

866. *Id.*
867. *Id.*
868. 437 N.W.2d 817 (N.D. 1989).
869. *State v. Tranby*, 437 N.W.2d 817, 818 (N.D. 1989).
870. *Tranby*, 437 N.W.2d at 818-19.
871. *Id.* at 819.
872. *Id.*
873. *Id.*
874. *Id.*
875. *Tranby*, 437 N.W.2d at 819.
876. *Id.* at 820.
877. *Id.*
878. *Id.*
879. *Tranby*, 437 N.W.2d at 820.

to be criminally negligent.[880] Safety regulations do not establish a legislatively mandated standard of care — they are only provided for the trier of fact's consideration.[881]

The court concluded that section 12.1-16-03 of the North Dakota Century Code does not violate due process.[882] A statute does not violate due process if it provides adequate warning as to the conduct proscribed and establishes minimal guidelines for law enforcement.[883] When read together with the definition of "negligently," the negligent homicide statute is sufficiently explicit for a reasonable person to understand the type of conduct that is acceptable.[884] The boundaries of the statute are sufficiently distinct for judges and juries to determine if an acceptable standard of conduct has been violated.[885] Therefore, the statute is not unconstitutionally vague, and failure to place two infants who could not swim in personal floatation devices could be considered as evidence of criminally negligent conduct.[886]

Second, Tranby asserted that the trial court incorrectly instructed the jury: The criminal information charged that a combination of acts caused the children's death, whereas the jury instructions required that he be found negligent in one or more of the particulars alleged to be found guilty.[887] He contended that the trial court thus changed the nature of the offense and violated his Sixth Amendment right to be informed of the accusation against him.[888] The supreme court responded by stating the state is not required to prove each allegation in a criminal complaint beyond a reasonable doubt, only the elements of the offense charged.[889] Further, the jury was instructed to consider all of the alleged conduct as "relevant facts or risks" to be weighed when determining guilt.[890] The instructions, as such, were correct.[891]

Third, Tranby asserted that the evidence was insufficient to sustain the verdict.[892] The court required Tranby to show that the evidence, when viewed in the light most favorable to the verdict,

880. *Id.*
881. *Id.* at 821.
882. *Tranby*, 437 N.W.2d at 821.
883. *Id.*
884. *Id.*
885. *Id.*
886. *Id.* at 822.
887. *Tranby*, 437 N.W.2d at 822.
888. *Id.* at 823.
889. *Id.*
890. *Id.*
891. *Id.*
892. *Tranby*, 437 N.W.2d at 823.

allowed no reasonable inference of guilt.[893] The court concluded that the evidence was sufficient to show circumstances that could have been found to constitute a gross deviation from acceptable standards, and that this conduct was the cause of the children's death.[894]

Fourth, Tranby asserted that the court erred in denying his motions for acquittal and a new trial.[895] Rule 29 of the North Dakota Rules of Criminal Procedure does not allow a motion for judgment of acquittal after a jury verdict of guilty.[896] A motion for a new trial is left to the discretion of the trial court and is conclusive unless abused.[897] This was not an instance of such abuse by a trial court.[898]

Finally, Tranby asserted that his right to a trial by an impartial jury was denied when his challenge for cause of a prospective juror was denied by the trial court.[899] Tranby had to use a peremptory challenge to remove the juror.[900] The court found that Tranby's sixth amendment rights were not violated because Tranby was able to remove the juror without the for cause challenge.[901] Tranby did not claim the jury was impartial, therefore his right to a fair and impartial jury was not violated.[902]

The order denying Tranby's post-trial motions and judgment of conviction were affirmed by the North Dakota Supreme Court.[903]

LEGAL MALPRACTICE

SWANSON V. SHEPPARD

In *Swanson v. Sheppard*,[904] an attorney misinformed his client about the dischargeability of student loans in bankruptcy.[905] Alan J. Sheppard represented Steven E. Swanson when Swanson filed Chapter 7 bankruptcy which did not discharge his student loan

893. *Id.* (citing State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988)).
894. *Id.* at 824.
895. *Id.*
896. *Id.* The Court limited its discussion to Tranby's motion for a new trial. *Id. See* N.D.R. CRIM. P. Rule 29(c).
897. *Tranby*, 437 N.W.2d at 824 (citing State v. Dringstad, 353 N.W.2d at 302 (N.D. 1984)).
898. *Id.*
899. *Id.*
900. *Id.*
901. *Id.* at 825.
902. *Tranby*, 437 N.W.2d at 825.
903. *Id.*
904. 445 N.W.2d 654 (N.D. 1989).
905. Swanson v. Sheppard, 445 N.W.2d 654, 656 (N.D. 1989).

obligations.[906] Swanson sued Sheppard for legal malpractice, alleging that Sheppard was negligent when he did not inform Swanson that student loans were treated differently under a Chapter 7 bankruptcy filing when compared with a Chapter 13 bankruptcy filing.[907]

The trial court ruled in Swanson's favor and determined damages to be those debts not discharged in bankruptcy minus any payments Swanson would have made pursuant to a Chapter 13 bankruptcy filing.[908]

Sheppard appealed to the North Dakota Supreme Court, contending that Swanson failed to establish the nature of a duty owed by Sheppard as an attorney or that Sheppard had breached any duty.[909] Sheppard's second argument was that the trial court erred in determining the damages.[910] Swanson cross-appealed, contending the trial court erred when it did not "impose sanctions against Sheppard for pleading a counterclaim for improper purposes."[911]

Initially, the North Dakota Supreme Court determined that expert testimony was not necessary when a professional's misconduct is obvious to a trier of fact who understands the nature of the specific duty owed.[912] The court further concluded that expert testimony was not needed when a basic duty existed to inform the client that student loans were treated differently under Chapter 7 and Chapter 13 bankruptcy filings.[913]

The supreme court determined that the information Sheppard gave Swanson concerning the differences in bankruptcy proceedings was clearly wrong and the trial court's determination that not providing the correct information constituted negligent representation was not clearly erroneous.[914]

The North Dakota Supreme Court, however, found that the trial court's determination of damages caused by Sheppard's negli-

906. *Swanson*, 445 N.W.2d at 656.
907. *Id.* A Chapter 7 bankruptcy filing does not discharge student loans unless the loans are first due five years prior to filing chapter 7 or nondischarge would cause undue hardship. *Id.* (citing 11 U.S.C. § 523(a)(8)). Chapter 13 bankruptcy filings do not have the same restrictions. *Id.* In Chapter 13 bankruptcies, the debtor files a plan to pay a portion of his debts over a period of time. *Id.* (citing 11 U.S.C. § 1328(a)). Thus, if Swanson had filed under Chapter 13, he would have had to only pay a portion of his student loan debts, rather than facing no discharge under chapter 7. *Id.*
908. *Swanson*, 445 N.W.2d at 657.
909. *Id.*
910. *Id.*
911. *Id.*
912. *Id.*
913. *Id.*
914. *Swanson*, 445 N.W.2d at 657-58.

gence was clearly erroneous.[915] The supreme court concluded these damages to be merely speculative; inadequate evidence had been presented to the trial court for it to determine damages.[916] The court remanded the case to provide Swanson an opportunity to explore other remedies to discharge his student loans.[917]

When Swanson filed the malpractice suit, Sheppard filed a counterclaim for defamation.[918] The trial court found Sheppard filed the counterclaim to discourage Swanson, but the court did not impose sanctions pursuant to Rule 11 of the North Dakota Rules of Civil Procedure, reasoning that Swanson did not suffer additional expense due to the counterclaim.[919]

The North Dakota Supreme Court found the trial court had clearly erred when it did not impose sanctions against Sheppard for violation of Rule 11.[920] The trial court was required to impose sanctions pursuant to the rule if it found that Rule 11 had been violated.[921]

The judgment was reversed and the case remanded.[922]

MENTAL HEALTH

O'CALLAGHAN V. L.B.

In *O'Callaghan v. L.B.*,[923] the court found that before involuntary admission, the trial court must assess the availability and appropriateness of alternate treatment programs other than involuntary commitment pursuant to statute.[924]

Renee O'Callaghan, a caregiver, filed a petition to have L.B. involuntarily admitted for treatment.[925] L.B. was a client in O'Callaghan's center and O'Callaghan testified that L.B. appeared to be delusional and had made threats to kill a neighbor.[926]

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915. *Id.* at 658. The trial court had found that if Swanson would have filed under chapter 13 bankruptcy, all his student loan debts would have been discharged. *Id.* Swanson would have been required to pay this amount over a three-year period under a chapter 13 plan. *Id.*

916. *Id.* at 658-59.

917. *Id.* The supreme court remanded, directing Swanson to mitigate his damages. The trial court can then proceed to redetermine damages. *Id.* at 659.

918. *Swanson*, 445 N.W.2d at 659. Sheppard moved to dismiss his counterclaim at the close of Swanson's case, without offering any evidence to support it. *Id.* Sheppard's attorney admitted there was no basis for the counterclaim after questioning Swanson. *Id.*

919. *Id.* Rule 11 of the North Dakota Rules of Civil Procedure provides for sanctions when an attorney signs pleadings that are imposed for an improper purpose. *Id.*

920. *Swanson*, 445 N.W.2d at 659.

921. *Id.*

922. *Id.*

923. 447 N.W.2d 326 (N.D. 1989).

924. O'Callaghan v. L.B., 447 N.W.2d 326, 328-29 (N.D. 1989).

925. *O'Callaghan*, 447 N.W.2d at 327.

926. *Id.*

The trial court determined that L.B. was a person requiring treatment under Chapter 25-03.1 of the North Dakota Century Code which provides that a person requires treatment if there is a "reasonable expectation" that there exists a "serious risk of harm to that person, others or property" if the person is not treated.[927]

L.B. appealed, contending that there was not clear and convincing evidence supporting the trial court's decision as required by the statute.[928] The supreme court determined that there was clear and convincing evidence that L.B. posed serious harm and affirmed the finding of the trial court.[929]

However, the supreme court found that section 25-03.1-21(1) of the North Dakota Century Code required the State Hospital to submit to the court a report determining the "availability and appropriateness of alternative treatment programs other than involuntary hospitalization."[930]

L.B. also contended that the statute had not been complied with, and the supreme court agreed.[931] The court noted that the only report of the State Hospital on alternative treatments was a "fill in the blank" form report which listed under alternatives to involuntary treatment: "[j]ail."[932] The doctor who prepared the report had only been in the state for two weeks and was unfamiliar with the forms of treatment available in the state.[933]

The supreme court determined that the trial court's conclusion of inadequate alternative treatment was based on an incomplete record and was not in compliance with Section 25-03.1-21(1) of the North Dakota Century Code.[934]

The supreme court reversed the trial court's order of involuntary commitment and remanded for consideration of a report assessing the availability of alternative treatment programs.[935]

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927. *O'Callaghan*, 447 N.W.2d at 328. *See* N.D. CENT. CODE § 25-03.1-07 (1987)(standards for involuntary admissions).

928. *Id.*

929. *Id.*

930. *Id. See* N.D. CENT. CODE § 25-03.1-21(1) (1987)(court shall review report and determine whether or not hospitalization is necessary).

931. *O'Callaghan*, 447 N.W.2d at 328.

932. *Id.*

933. *Id.* Dr. Pryatel, the doctor who prepared the report, testified at the hearing that if the environment was very structured, L.B. could perhaps be in a halfway house. *Id.*

934. *Id.*

935. *Id.* at 329.

MORTGAGE (FARM)

FEDERAL LAND BANK OF ST. PAUL V. BOSCH

In *Federal Land Bank of St. Paul v. Bosch*,[936] Peter Bosch appealed a foreclosure of his mortgage by the Federal Land Bank of St. Paul.[937] In 1982, Bosch had borrowed $110,000, giving the bank a security interest in his mortgage on his farmland and buildings.[938] Bosch failed to make his February 1986 payment and did not pay his 1985 and 1986 real estate taxes.[939] In May 1986, the bank denied Bosch's request to restructure his loan after determining that Bosch would not be able to manage the debt.[940] The bank commenced foreclosure in July 1986 and judgment was entered in September 1987.[941]

On appeal, Bosch first asserted that the trial court misconstrued section 28-29-05 of the North Dakota Century Code when it determined that foreclosing without delay would not be unconscionable even though the amount of debt did not exceed the fair market value of the property at trial.[942] The supreme court found that the trial court had not abused its discretion when the trial court considered the interest that would accrue on the mortgage indebtedness during the one-year redemption period and that real estate taxes for two years remained unpaid.[943]

Second, Bosch claimed that the bank was not authorized to raise his interest rate after the default.[944] He argued that a farm credit administration regulation which allows the higher interest rates exceeded the bank's authority.[945] However, federal legislation gives broad authority to federal land banks to set interest rates.[946] Bosch had no convincing authority to persuade the court

936. 432 N.W.2d 855 (N.D. 1988).
937. Federal Land Bank of St. Paul v. Bosch, 432 N.W.2d 855, 856 (N.D. 1988).
938. *Bosch*, 432 N.W.2d at 856.
939. *Id.*
940. *Id.*
941. *Id.*
942. *Bosch*, 432 N.W.2d 856. *See* N.D. CENT. CODE § 28-29-05 (1974 & Supp. 1989)(providing discretionary authority to delay foreclosures). At trial, the fair market value of the property was $156,000 which exceeded the mortgage indebtedness by $9,400. *Bosch*, 432 N.W.2d at 856.
943. *Bosch*, 432 N.W.2d at 856. With interest accruing at $51.16 per day after June 1987, the debt at the end of 184 days from the trial date would exceed the value of Bosch's property. *Id.*
944. *Id.* at 857. The mortgage provided that upon default the interest rate would increase from 12.5% to 14.5% on both the principal and interest. *Id.*
945. *Id.* Both parties agree that federal law controlled. *Id.*
946. *Id. See* Farm Credit System Act, 12 U.S.C. § 2015 (1984 & Supp. 1989)(providing in relevant part: "Loans made by a Federal Land Bank shall bear interest at a rate or rates, and on such terms and conditions, as may be determined by the board of directors of the bank from time to time"). *See also* 12 C.F.R. § 614.4290 (1989)(providing for higher interest

that the administrative regulation or mortgage terms at issue are invalid.[947]

Third, Bosch asserted that the bank failed to comply with a federal regulation which requires that lending institutions consider forbearance actions prior to foreclosure.[948] The bank did not do so because this regulation became effective on October 28, 1986, after filing of the present foreclosure action.[949] The supreme court noted that an action to foreclose a mortgage is an equitable proceeding.[950] The court also found that failing to comply with an administrative forbearance regulation gives rise to a valid equitable defense to foreclosure.[951] Forbearance actions enacted under the federal regulations were incorporated into the Agricultural Credit Act of 1987, thus indicating Congress' concern about lenders' foreclosing on delinquent farm loans without giving adequate consideration to forbearance.[952] In another jurisdiction, the court concluded that the Act was applicable even though it became effective after a foreclosure judgment.[953] Thus, under the federal regulation, Bosch was entitled to reconsideration of his loan for forbearance action and to a reversal of foreclosure.[954] He also was entitled to disclosure of interest rate information, and this was to be supplied on remand.[955]

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rates after maturity of a loan); McGovern v. Federal Land Bank of St. Paul, 209 Minn. 403, 296 N.W. 473 (1941).

947. *Bosch*, 432 N.W.2d at 858.

948. *Id.* at 857-58; 12 C.F.R. § 614.4513(b) (1989)(requiring considering forbearance before foreclosure and enumerating the types of forbearance actions available — deferral or rescheduling of principal or interest payments, renewal or extension of the loan or "a reduction in the amount or rate of principal or interest due").

949. *Bosch*, 432 N.W.2d at 858.

950. *Id.* (citing Union State Bank v. Miller, 335 N.W.2d 807 (N.D. 1983)(*cert. denied*), 464 U.S. 1019 (1983).

951. *Bosch*, 432 N.W.2d at 858. *See* Federal Land Bank of St. Paul v. Overboe, 404 N.W.2d 445 (N.D. 1987).

952. *Bosch*, 432 N.W.2d at 858. *See* 12 U.S.C. § 2202(a)(b)(1) (lender must provide written notice when loan is suitable for restructuring); 12 U.S.C. 2202(a)(e)(1) (loan must be restructured if the cost of restructuring is less than foreclosure costs); 12 U.S.C. 2202(a)(b)(3) (no foreclosure is allowed before lender has completed any pending consideration of restructuring).

953. *Bosch*, 432 N.W.2d at 858. *See* Harper v. Federal Land Bank of Spokane, 692 F. Supp. 1244 (Dist. Or. 1988)(restructuring provisions applicable where judgments of foreclosure had been entered but sheriff's sale had not occurred).

954. *Bosch*, 432 N.W.2d at 859.

955. *Id.* Justice VandeWalle concurred with the majority that the bank should have considered forbearance actions but noted that even if it had, the same results would have occurred. *Id.* Thus, under the harmless-error standard of rule 61 of the North Dakota Rules of Civil Procedure, the judgment would have been affirmed. *Id.* However, because production of the "family farm" has always had a special status in North Dakota, he agreed that every legally required consideration must be examined and appear of record. (VandeWalle, J., concurring. *Id.* at 859-60.)

MUNICIPAL LAW

CITY OF BISMARCK V. SHOLY

In *City of Bismarck v. Sholy*,[956] Sholy appealed a conviction of violating a "dog at large" ordinance.[957] The issue on appeal was whether Bismarck City Ordinance 3-03-05 required a culpable state of mind.[958]

Municipal ordinances are generally construed in the same manner as state statutes with words being given their ordinary meaning unless a contrary intention is clear.[959] Courts have interpreted the word "permit" either as requiring or not requiring culpability.[960] The North Dakota Supreme Court determined that "permit" required some level of culpability because penal statutes should be construed in favor of the defendant against the government.[961]

The court noted that it would reach the same conclusion on the basis of legislative intent.[962] In Bismarck's "dog at large" ordinance, the authors simply used the word "permit," whereas in the "animal at large" ordinance, the city used "allow or permit."[963] Thus, the "animal at large" ordinance was intended to be broader than the "dog at large" ordinance.[964] Using "permit" alone

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956. 430 N.W.2d 337 (N.D. 1988).

957. City of Bismarck v. Sholy, 430 N.W.2d 337, 337 (N.D. 1988).

958. *Sholy*, 430 N.W.2d at 337. *See* BISMARCK, N.D., CODE § 3-03-05 (1987)(providing in part that "[i]t is unlawful for any owner or keeper of a dog to permit the animal to be at large")(amended 11/8/88 ("No intent or knowledge by the owner or keeper of a dog is necessary to prove a violation of this ordinance")).

959. *Sholy*, 430 N.W.2d at 337 (citing City of Minot v. Central Ave. News, Inc. 308 N.W.2d 851 (N.D. 1981), *appeal dismissed* 454 U.S. 1117 (1981)). *See* N.D. CENT. CODE § 1-02-02 (1987 & Supp. 1989)(providing that "[w]ords used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, . . .").

960. *Sholy*, 430 N.W.2d at 337-38. *Compare* LaBelle v. Powers Mercantile, 103 Minn. 515, 114 N.W. 11 31 (1908)(elevator operator did not "permit" boy to run elevator) and Lemery v. Leonard, 99 Or. 670, 196 P.376 (1921)(without knowledge one does not permit one's livestock to be at large) *with* Wittenberg v. Bd. of Liquor Control, 80 N.E.2d 711 (Ohio Ct. App. 1948)("permit" requires no culpability) and Marcum v. Bellomy, 157 W.Va. 636, 203 S.E.2D 367 (1974)(an improperly secured doe is "permitted" to run at large).

961. *Sholy*, 430 N.W.2d at 338 (citing State v. Hogie, 424 N.W.2d 630 (N.D. 1988): State v. Sheldon, 312 N.W.2d 367, 369 (N.D. 1981)).

962. *Sholy*, 430 N.W.2d at 338 (quoting State v. Olson, 356 N.W.2d 110, 112 (N.D. 1984)("[w]hether an offense is punishable without proof of intent, knowledge, willfulness, or negligence is a question of legislative intent to be determined by the language of the statute in connection with its manifest purpose and design")). *See* Dickinson Public School District No. 1. v. Scott, 252 N.W.2d 216 (N.D. 1977)(all ordinances are to be construed together).

963. *Sholy*, 430 N.W.2d at 338. Section 3-01-10 of the City of Bismarck Code of Ordinances provides in part: "It is unlawful for any person to *allow or permit* any animal owned by or under his control to run at large within the city." [Emphasis added.] *Sholy*, 430 N.W.2d at 338.

964. *Id.* B. Garner, A Dictionary of Modern Legal Usage (1987), defines "allow" as "the absence of opposition" and "permit" as "affirmative sanction or approval." *Sholy*, 430 N.W.2d at 338.

requires some level of culpability, and the conviction was reversed.[965]

NEW TRIAL

CULLEN V. WILLIAMS COUNTY

In *Cullen v. Williams County*,[966] the court determined that it could not make an intelligent review of an appeal of a personal injury action because of an incomplete transcript provided by the plaintiff.[967]

Michael Cullen was injured when the school bus he was driving collided with an oil tanker truck.[968] He and his wife brought an action against Williams County for negligent design and maintenance of the roadway and against Jim Florey for the negligent repair of the school bus.[969] The trial court dismissed the action after a jury determined no negligence on the part of the county or Florey.[970]

On appeal the Cullens contended that a new trial should have been granted because Florey's trial attorney made improper remarks to the jury, certain evidentiary rulings were erroneous and because Florey's attorney was allowed to substitute a witness.[971]

The North Dakota Supreme Court determined that pursuant to the "harmless error" rule, only errors that affect the substantial rights of the parties would create conditions justifying a new trial.[972]

The court noted that the transcript provided by the Cullens was only a partial transcript.[973] The court allowed the appeal but warned the Cullens that the partial transcript might impinge upon "meaningful and intelligent appellate review."[974] The court determined that the partial transcript did not provide a sufficient

965. *Sholy*, 430 N.W.2d at 339.
966. 446 N.W.2d 250 (N.D. 1989).
967. Cullen v. Williams County, 446 N.W.2d 250, 253 (N.D. 1989).
968. *Cullen*, 446 N.W.2d at 251.
969. *Id.* There was testimony that the mechanic repaired the bus 30 days before the accident and the bus had worked fine until then. *Id.* at 253 n.3.
970. *Id.* at 251-52. The Cullens moved for a new trial and for sanctions against the mechanic's trial attorney. *Id.* at 252. The trial court dismissed the motion. *Id.* The Cullens' claims against the county were settled after trial. *Id.* at 252 n.1.
971. *Cullen*, 446 N.W.2d at 252.
972. *Id.*
973. *Id.* Partial transcripts are permitted if both parties stipulate, however, Florey did not agree in this case. *Id. See* N.D.R. APP. P. 10(b) (requires appellant to furnish the entire transcript).
974. *Cullen*, 446 N.W.2d at 252.

basis for meaningful and intelligent appellate review.[975] Therefore, the court was unable to examine the prejudicial nature of any of the errors alleged by the Cullens in order to grant a new trial.[976]

The court concluded that this was a case where failure to provide a transcript precluded a party's success in an appeal and affirmed the trial court's order denying the Cullens' motion for a new trial and sanctions.[977]

KARST V. VICKERS

In *Karst v. Vickers*,[978] a jury verdict attributing percentages of negligence to "dusk" and "design of roadway" was held to have demonstrated the jury's total misapprehension of the law and warranted a new trial.[979]

Cameron, Constance, and Justin Karst were awarded damages against the estate of Roger R. Vickers for injuries they incurred in an automobile accident.[980] The jury apportioned percentages of negligence to "dusk" and "design of roadway" and the Karsts moved for a new trial.[981] The motion was denied by the trial court and the Karsts appealed.[982]

The North Dakota Supreme Court found that the instruction on ordinary negligence instructed clearly that negligence was the breach of a duty of care by a person.[983] The court also found that inanimate objects such as "dusk" and "design of roadway" could not breach a duty of care.[984]

The trial court had concluded that the jury's errors were harmless, but the supreme court did not agree.[985] The supreme court, citing Rule 59(g) of the North Dakota Rules of Civil Procedure, found that by attributing a percentage of negligence to inanimate objects the jury showed a total misapprehension of the instructions and the law of negligence.[986]

The supreme court held that the trial court abused its discre-

975. *Id.* at 253. None of the testimony heard by the jury was in the record. *Id.*
976. *Cullen*, 446 N.W.2d at 253. The court also determined that the partial transcript contained no remarks of Florey's attorney warranting sanctions. *Id.*
977. *Id.* at 253.
978. 444 N.W.2d 698 (N.D. 1989).
979. Karst v. Vickers, 444 N.W.2d 698, 699 (N.D. 1989).
980. *Karst*, 444 N.W.2d at 699. Vickers was driving while under the influence and was killed as a result of the accident. *Id.*
981. *Id.*
982. *Id.*
983. *Id.* at 700.
984. *Id.*
985. *Karst*, 444 N.W.2d at 700.
986. *See* N.D.R. CIV. P. 59(g) (verdict may be vacated if rendered under misapprehension of the instructions).

tion in denying the Karsts' motion for a new trial and reversed the judgments and remanded for a new trial.[987]

SATHERN V. BEHM PROPANE, INC.

In *Sathern v. Behm Propane, Inc.*,[988] a juror's mistaken response during voir dire was held not to warrant a new trial in a personal injury action.[989]

George Sathern sustained injuries in an industrial accident and brought a personal injury action against Behm Propane.[990] During voir dire, juror Kennedy answered in the negative when asked if he had a business relationship with Behm.[991] As the result of an investigation after the jury returned a verdict for Behm, Sathern discovered that Kennedy had done a small amount of business with Behm three years before the trial.[992]

Sathern moved for a new trial and the trial court initially granted the motion.[993] After Kennedy's affidavit surfaced, stating he was unaware of the business until after the trial, the trial court reversed its prior order and denied Sathern's motion for a new trial.[994]

Sathern contended on appeal to the North Dakota Supreme Court that the trial court erred in denying his motion.[995] The supreme court noted that it would not set aside the trial court's decision unless there was an affirmative showing that it abused its discretion.[996]

The North Dakota Supreme Court cited to the United States Supreme Court and noted it would not adopt the United States Supreme Court's standard, but did agree with the court's reasoning that only false answers that would affect a juror's impartiality would warrant granting a motion for a new trial.[997]

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987. *Karst*, 444 N.W.2d at 700. The jury's misunderstanding of the instructions "tainted the entire verdict." *Id.*

988. 444 N.W.2d 696 (N.D. 1989).

989. Sathern v. Behm Propane, Inc., 444 N.W.2d 696, 698 (N.D. 1989).

990. *Sathern*, 444 N.W.2d at 696.

991. *Id.*

992. *Id.* This business consisted of a single service call conducted by a company employee. *Id.* at 697.

993. *Id.*

994. *Id.*

995. *Sathern*, 444 N.W.2d at 697. Sathern asserted he would have exercised a preemptory challenge to excuse Kennedy if Kennedy had disclosed the prior relationship. *Id.*

996. *Id.* An abuse of discretion in failing to grant a motion for a new trial is defined as an unreasonable arbitrary or unconscionable attitude on the part of the court. *Id.* (citing Holte v. Carl Albers, Inc., 370 N.W.2d 520, 524 (N.D. 1985)).

997. *Sathern*, 444 N.W.2d at 698. In *McDonough Power Equip., Inc. v. Greenwood*, a juror mistakenly failed to respond to a question in voir dire. McDonough Power Equip.,

The North Dakota Supreme Court found that in *Sathern* a single business transaction, of which a juror did not recall, could not have affected his impartiality at trial.[998] The court cited to Rule 61 of the North Dakota Rules of Civil Procedure which provides that no error is a ground for setting aside a verdict or granting a new trial unless the refusal to take such action appears to be inconsistent with substantial justice.[999]

The court found that Sathern's substantial rights were not affected by Kennedy's honestly mistaken response.[1000] The trial court did not abuse its discretion in denying Sathern's motion for a new trial.[1001] The judgment was affirmed.[1002]

OFFICERS & PUBLIC EMPLOYEES

BERDAHL V. N.D. STATE PERSONNEL BD.

In *Berdahl v. N.D. State Personnel Bd.*,[1003] a state employee's termination was supported by the evidence and no due process violations took place during his dismissal from the North Dakota State Highway Department.[1004]

Ross Berdahl was employed by the North Dakota Highway Department operating a four-ton Highway Department truck and similar vehicles.[1005] Berdahl also operated a personal business repairing automobiles.[1006] The Highway Department had policies which prohibited the personal use of Highway Department vehicles.[1007] The Department had policies against the interference of outside employment with a Highway Department job.[1008] Berdahl was well informed of these departmental policies.[1009]

In September of 1986, a Highway maintenance supervisor discussed with Berdahl a number of violations of these policies and warned him that it could result in a termination of Berdahl's

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Inc. v. Greenwood, 464 U.S. 548 (1984). The U.S. Supreme Court reversed the trial court's decision to grant a new trial and thought it was "contrary to the practical necessities of judicial management," since a trial is an important investment of private and social resources. *Id.* at 553-56.

998. *Sathern*, 444 N.W.2d at 698.

999. *Id. See* N.D.R. CIV. P. 61 (no error on any ruling is ground for granting a new trial unless refusal to take action is inconsistent with substantial justice).

1000. *Id.*

1001. *Id.*

1002. *Id.*

1003. 447 N.W.2d 300 (N.D. 1989).

1004. Berdahl v. N.D. State Personnel Bd., 447 N.W.2d 300, 305 (N.D. 1989).

1005. *Berdahl*, 447 N.W.2d at 301.

1006. *Id.*

1007. *Id.*

1008. *Id.*

1009. *Id.*

employment.[1010] Berdahl's supervisor observed another violation in March of 1987, and Berdahl admitted that he had used a department vehicle for personal use.[1011] Later that month, the Department notified Berdahl that they were considering suspending him and on April 9, 1987, suspended him for three days.[1012] Berdahl unsuccessfully appealed the suspension through the internal grievance procedure of the Highway Department and then the State Personnel Board.[1013] After suspension was served, the Highway Department learned of another prior incident in which Berdahl violated departmental policy.[1014] In July, Berdahl was informed that the Department was considering dismissing him.[1015] In August, Berdahl was informed of his dismissal and appealed eventually to the State Personnel Board.[1016] The board upheld Berdahl's dismissal, as did the district court, and Berdahl appealed to the North Dakota Supreme Court.[1017]

Berdahl first contended that the department's findings were not supported by the preponderance of the evidence.[1018] The supreme court found that the record was replete with testimony regarding Berdahl's misuse of state vehicles, use of department time for personal business and Berdahl's abuse of sick leave.[1019] The court concluded that a reasoning mind could have reasonably determined that the allegations were supported by the evidence.[1020]

Berdahl's second contention was that he was denied due process.[1021] The court cited to *Cleveland Bd. of Educ. v. Loudermill*,[1022] and determined that Berdahl was afforded the due process mandated by *Loudermill* because he received a

1010. *Berdahl*, 447 N.W.2d at 301-02. A member of the public had reported Berdahl's misuse of a department vehicle to a district office. *Id.* at 301.

1011. *Id.*

1012. *Id.*

1013. *Id.*

1014. *Id.*

1015. *Berdahl*, 447 N.W.2d at 302. The dismissal was based on charges that Berdahl used department vehicles for his personal use, used departmental time to conduct his personal business, created a bad image for the department and abused his sick leave. *Id.*

1016. *Id.* Berdahl responded to the notices of dismissal through letters by his attorney. *Id.*

1017. *Id.* at 302-03.

1018. *Id.* at 303. The supreme court's review of administrative agency decisions is governed by section 28-32-19 of the North Dakota Century Code. *Id. See* N.D. CENT. CODE § 28-32-19 (Supp. 1989)(appeal procedure for review of an administrative appeal).

1019. *Berdahl*, 447 N.W.2d at 304. Additionally, Berdahl admitted his misuse of department vehicles. *Id.* Berdahl's testimony was often uncorroborated, and he offered little evidence in support of his argument. *Id.*

1020. *Id.*

1021. *Id.*

1022. 470 U.S. 532 (1985).

pretermination notice, received a summary of the evidence against him, was afforded an opportunity to respond, and a post termination hearing was held.[1023]

Finally, Berdahl asserted that the three day suspension before the department found out about the third violation acted as administrative res judicata against further disciplinary action on the third violation.[1024] The supreme court noted that the department had no knowledge of the third incident at the time of the suspension and could not have raised it at the time the department decided to suspend Berdahl.[1025] The court determined that the third incident was wholly separate from the two incidences for which Berdahl was suspended.[1026] The court concluded that the department was entitled to consider the third incident as well as all of Berdahl's violations in determining whether or not to terminate Berdahl's employment and therefore there was no reason to apply the doctrine of administrative res judicata to Berdahl's claim.[1027]

The judgment was affirmed.[1028]

OIL AND GAS

HOLMAN V. STATE

In *Holman v. State*[1029] the issue was whether oil and gas leases, which retained an overriding royalty interest, was an assignment or sublease.[1030] The case involved mineral interests in two quarters of land in Dunn County.[1031] The leasehold or mineral interests were owned by three parties: fifty percent of the minerals were owned by the state; forty percent by the Bren family; and, ten percent by Andrew Heiser.[1032] In 1972 Natt Holman entered into an oil and gas lease with the Brens.[1033] In 1976 Holman assigned his oil and gas rights to Amoco Production Com-

1023. *Berdahl*, 447 N.W.2d at 306. Berdahl also contended that his due process was violated because a member of the State Personnel Board participated in deciding his appeal. *Id.* The supreme court found no evidence of the member's prejudice, and no evidence of any pecuniary interest of the member in the outcome, and thus no violation of due process. *Id.*

1024. *Id.* at 307.

1025. *Id.*

1026. *Id.*

1027. *Id.*

1028. *Berdahl*, 447 N.W.2d at 307.

1029. 438 N.W.2d 534 (N.D. 1989).

1030. Holman v. State, 438 N.W.2d 534, 537 (N.D. 1989).

1031. *Holman*, 438 N.W.2d at 535.

1032. *Id.*

1033. *Id.*

pany, reserving a five percent overriding royalty interest.[1034] After a series of transfers the original Holman mineral interest ended up with Great Plains Petroleum, Inc. (GPP).[1035]

In 1985 Holman assigned his five percent overriding interest to GPP who subsequently filed Chapter 11 Bankruptcy.[1036] Holman then commenced a quiet title action to determine respective mineral interests in the property.[1037] The state, as one of the defendants, alleged that Holman had no mineral interest because of his assignment to Amoco.[1038] The district court granted the state's motion for summary judgment.[1039] Holman appealed the trial court decision.[1040]

The North Dakota Supreme Court concluded that the trial court did not err in determining that the 1976 transfer to Amoco from Holman was an assignment.[1041] Holman's argument was that his conveyance to Amoco was a sublease, not an assignment, because of his reservation of the five percent overriding royalty interest.[1042] The supreme court indicated that oil and gas conveyances are interpreted by the same rules that govern contractual agreements.[1043] The rule interpreting contracts is found in sections 9-07-03 and 9-07-04 of the North Dakota Century Code.[1044] The supreme court determined that the language of the granting clause of the agreement transferring the lease to Amoco from Holman, as well as the parties' subsequent action, indicated an intent to assign all interests subject to the five percent royalty.[1045] The court followed the lead of a majority of jurisdictions by declaring that the royalty interest was not sufficient to defeat an assign-

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1034. *Id.*

1035. *Holman*, 438 N.W.2d at 535. Amoco assigned its oil and gas lease to Sunbehm Gas, Inc., which assigned the lease to Great Plains Petroleum, Inc., *Id.*

1036. *Id.*

1037. *Id.* at 535.

1038. *Id.*

1039. *Id.* at 536. The trial court decided that "there is no genuine issue of material fact and the State is entitled to judgment as a matter of law." *Id.*

1040. *Id.*

1041. *Id.* at 540.

1042. *Id.* at 537. If a tenant transfers an entire interest, the transfer is considered an assignment, whereas a sublease occurs when less than an entire interest is transferred. *Id.* (citing 5 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 64.2 at 232 (1978)).

1043. *Holman*, 438 N.W.2d at 537 (citing Miller v. Schwartz, 354 N.W.2d 685, 688 (N.D. 1984); Johnson v. Mineral Estate, Inc., 343 N.W.2d 778, 780 (N.D. 1984); MacMaster v. Onstad, 86 N.W.2d 36, 40 (1957)).

1044. *Holman*, 438 N.W.2d at 538. *See* N.D. CENT. CODE §§ 9-07-03 (1987)(a contract is to be interpreted according to intent of parties); 9-07-04 (1987)(if intent may not be ascertained from the writing, the parties' actions may be considered).

1045. *Holman*, 438 N.W.2d at 538. Holman had signed a document entitled "Correction of Assignment" that referred to the transfer to Amoco as an assignment. *Id.*

ment.[1046] Thus, the district court ruling was affirmed.[1047]

PARENT AND CHILD

IN INTEREST OF L.J. AND R.J.

In *In Interest of L.J. and R.J.*,[1048] the mother (K.J.) of two mentally retarded male children appealed the termination of her parental rights.[1049] In April 1985, K.J. and her husband (B.J.) had all five of their children removed from the home following a long history of involvement with the county social services.[1050] A petition for termination of parental rights with regard to the two mentally handicapped children was filed in May 1986, alleging little or no progress on the part of the parents in being able to adequately provide for the boys.[1051] K.J.'s parental rights were subsequently terminated by the juvenile court.[1052]

When reviewing termination decisions, the North Dakota Supreme Court examines the evidence in a manner similar to trial de novo.[1053] Although the juvenile court's findings were given considerable weight, the court was not bound by them.[1054] To terminate parental rights, the state must show that: 1) the child is "deprived"; 2) "the conditions and causes of deprivation are likely to continue or will not be remedied"; and 3) because of the conditions and causes, "the child is suffering or will probably suffer serious physical, mental, moral or emotional harm."[1055]

Under section 27-20-02(5)(a) of the North Dakota Century Code, a deprived child lacks proper parental care, control, subsistence, or education, and the deprivation is not caused by a lack of financial resources.[1056] The boys' deprivation had to do with the lack of supervision and lack of attention to their needs.[1057] There was abundant evidence to establish that in this case the depriva-

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1046. *Id.* at 540. *See* 3 W. SUMMERS, THE LAW OF OIL AND GAS § 553 at 598-99 (1958)(weight of authority does not treat overriding royalty as an interest, thus, no sublease).

1047. *Id.* at 540.

1048. 436 N.W.2d 558 (N.D. 1989).

1049. *In re* L.J., 436 N.W.2d 558, 559 (N.D. 1989).

1050. *In re L.J.* at 560. Since 1980, twenty-one abuse and neglect reports were filed of which fifteen were substantiated. *Id.*

1051. *In re L.J.*, 436 N.W.2d at 560. The parents were to have corrected the home conditions and participated in various social services programs. *Id.*

1052. *Id.*

1053. *Id.* (citing *In re* C.S., 417 N.W.2d 846, 847 (N.D. 1988)).

1054. *In re L.J.*, 436 N.W.2d at 560 (citing *In re* C.S., 417 N.W.2d at 848; *In re* A.M.C., 391 N.W.2d 178, 179 (N.D. 1986)).

1055. *In re L.J.*, 436 N.W.2d at 560. *See* N.D. CENT. CODE § 27-20-44 (1974 & Supp. 1989)(termination of parental rights).

1056. *In re L.J.*, 436 N.W.2d at 560.

1057. *Id.*

tion was not primarily due to finances.[1058]

K.J. asserted that the juvenile court violated her constitutional right to parenting by requiring a standard of care for her children that would be virtually impossible for any parent to satisfy.[1059] However, the special needs of children are relevant in determining whether there would be continuing or unremediated deprivation.[1060] Parents do have a fundamental right to their children, and this right may not be lost merely because a parent can not optimize the child's potential.[1061] However, care must satisfy minimum community standards.[1062] The care required to meet a minimum standard fluctuates with the kind of child; care is not an absolute standard.[1063] For a special needs child, the minimum care must provide necessities plus the support and nurture that will allow reasonable development given the child's reasonable potential.[1064]

The evidence was dramatic both in documenting the degree of deprivation suffered by the two children as well as their substantial improvement while in foster care.[1065] K.J.'s parenting skills may not be judged inadequate only by comparison with the foster parents if she is able to provide minimum care.[1066] The comparison does, however, provide evidence for assessing the children's potential.[1067] Even without comparison, there was clear and continuing evidence of K.J.'s inadequate parenting.[1068]

K.J. argued that she has improved conditions in the home and that she can now remedy the deprivation.[1069] However, expert testimony established that the caregiver must be able to understand the boys' special needs and provide constant reinforcement of their skills at home.[1070] Many witnesses testified that K.J. could not understand the children's needs and that the home structure

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1058. *Id.* (citing *In re* D.S., 325 N.W.2d 654, 660 (N.D. 1982)).

1059. *In re L.J.*, 436 N.W.2d at 561.

1060. *Id.* (citing Jacobson v. V.S., 271 N.W.2d 562 (N.D. 1978)).

1061. *In re L.J.*, 436 N.W.2d at 561 (citing Kleingartner v. D.P.A.B., 310 N.W.2d 575, 578 (N.D. 1981); *In re* L.N., 319 N.W.2d 801, 805 (N.D. 1982)).

1062. *In re L.J.*, 436 N.W.2d at 561 (citing Asendorf v. M.S.S., 342 N.W.2d 203, 206 (N.D. 1983)).

1063. *In re L.J.*, 436 N.W.2d at 561.

1064. *Id.*

1065. *Id.* at 561-62.

1066. *Id.* at 562 (citing *In re* J.A., 283 N.W.2d 283, 93 (N.D. 1979)(quoting *In re* R.D.S., 259 N.W.2d 636, 638 (N.D. 1977)).

1067. *In re L.J.*, 436 N.W.2d at 562.

1068. *Id.*

1069. *Id.* K.J. noted that the boys are now in school; her husband, who was retarded and required much care, died; and her two teenage sons could assist her. *Id.*

1070. *In re L.J.*, 436 N.W.2d at 563.

would disintegrate if the boys returned.[1071] Lack of cooperation with social services was also relevant in deciding whether deprivation would continue, and K.J. was unable to cooperate sufficiently.[1072]

Psychologists, social workers, and special education professionals testified that returning the children to an environment ill-equipped to provide for their special needs would cause serious mental harm and impair their ability to learn.[1073]

The order of termination was affirmed.[1074]

PHYSICIANS & SURGEONS

SANDE V. STATE

In *Sande v. State*,[1075] a nurse was publicly reprimanded and fined by the state board of nursing for violating the Nurses Practices Act in chapter 43-12.1 of the North Dakota Century Code by practicing without a license.[1076] The nurse appealed to a district court which reversed the decision of the board, and the board and state appealed to the North Dakota Supreme Court.[1077]

Nancy Njaa Sande had been a registered nurse since 1969 and had renewed her license to practice nursing each year.[1078] In November of 1987, Sande realized she had not received her renewal card for that year.[1079] She paid a late renewal fee and the board of nursing filed an administrative complaint against Sande pursuant to state statute for "willful and repeated" violations in practicing nursing without a license.[1080]

At a hearing, the board presented evidence that 10,000 nursing license renewals were mailed each year and that Sande's form was not returned undelivered.[1081] Sande testified that she knew she needed a license to practice but did not realize that she was practicing in 1987 without a license.[1082] The board determined

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1071. *Id.*

1072. *Id.* (citing *In re* R.M.B. 402 N.W.2d 912, 918 (N.D. 1987); McBeth v. J.J.H. 343 N.W.2d 355, 360 (N.D. 1984)).

1073. *In re L.J.*, 436 N.W.2d at 563-64.

1074. *Id.* at 564.

1075. 440 N.W.2d 264 (N.D. 1989).

1076. Sande v. State, 440 N.W.2d 264, 265 (N.D. 1989).

1077. *Sande*, 440 N.W.2d at 266.

1078. *Id.* at 265.

1079. *Id.*

1080. *Id. See* N.D. CENT. CODE § 43-12.1-03 (1987)(license required to practice nursing); N.D. CENT. CODE § 43-12.1-15(4) (1987)(practicing without a license is a class B misdemeanor).

1081. *Sande*, 440 N.W.2d at 265.

1082. *Id.*

that Sande violated the statutes by practicing as a nurse without a license.[1083] The board also concluded that it was not necessary to find intent for the board to determine that Sande's conduct was constituted willful and repeated violations.[1084] The board fined Sande five dollars per day for ninety-two working days that she was in violation.[1085] Sande was also publicly reprimanded.[1086]

Sande appealed to the district court which held in her favor.[1087] The district court held that it must be shown that Sande was consciously aware of her violation before the board could discipline her.[1088]

On appeal, the board and the state contended that the district court could not hear the appeal because Sande did not serve a member of the board with her notice of appeal as the statute required.[1089] Sande's documents were served on the assistant attorney general who represented both the state and the board.[1090] The board argued that service on at least one board member was required by the statute.[1091] Sande contended that it was sufficient to serve the assistant attorney general under the rules of civil procedure.[1092] The state supreme court agreed with Sande, stating that unless a statute is inconsistent with the rules of civil procedure, the rules would govern an appeal of an administrative agency decision.[1093]

The board must have found Sande guilty of willfully and repeatedly violating the provisions governing nursing practices to

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1083. *Id.*

1084. *Id.*

1085. *Sande*, 440 N.W.2d at 266. The days were computed from July 5, 1987, when the daily fine was authorized in an amendment to section 43.12.1-14 of the North Dakota Century Code, and from November 13, 1987, the date that Sande went to the renewal office. *Sande*, 440 N.W.2d at 266, n.2.

1086. *Sande*, 440 N.W.2d at 266.

1087. *Id.*

1088. *Id.*

1089. *Id.* *See* N.D. CENT. CODE § 28-32-15 (1987)(notices of administrative agency appeals must be served on the agency, the attorney general or assistant attorney general, and upon all the parties).

1090. *Sande*, 440 N.W.2d at 266.

1091. *Id.*

1092. *Id.*

1093. *Id.* (citing Shroeder v. Burleigh County Board of Commissioners, 252 N.W.2d 893, 895 (N.D. 1977)). *See* N.D.R. CIV. P. 5(b) (service on a party's attorney constitutes proper service if service is required or permitted on a party represented by an attorney). Furthermore, North Dakota statutory law require that the court affirm an administrative decision: "(1) if the findings of fact are supported by a preponderance of the evidence; (2) if the conclusions of law are sustained by the findings of fact; (3) if the agency decision is supported by the conclusions of law; and (4) if the decision is in accordance with the law." *Sande*, 440 N.W.2d at 267. *See* N.D. CENT. CODE § 28-32-19 (1987). *See also In re* Stone Creek Channel Improvements, 424 N.W.2d 894, 896 (N.D. 1988).

discipline her.[1094] The board contended that the meaning of willfully should include any voluntary act whether or not it was a conscious violation.[1095] Sande argued that proof of conscious violation should be required.[1096]

The court noted that its decision did not solely depend on the meaning of "willfully," and found that for the board to discipline Sande, her conduct must be willful and repeated.[1097] The board treated each day Sande practiced nursing without a license as a violation.[1098] The court stated that for a violation to be repeated, the violator must be conscious of prior violations.[1099]

The court found that because Sande's conduct could not be characterized as willful and repeated, the board was not authorized to discipline her, and the Supreme Court affirmed the district court's judgment dismissing the board's complaint.[1100]

PRODUCTS LIABILITY

BUTZ V. WERNER

In *Butz v. Werner*[1101] there were three issues. The first issue was whether the determination of an unsafe product, due to a failure to warn, was a question of fact.[1102] The second issue was whether plaintiff was required to elect one theory of recovery over another.[1103] The third issue was whether the trial court erred in refusing to permit defendants demonstrative evidence.[1104] Butz and Werner had been fishing, with two others, when they decided to try out the "super tube" Werner had recently purchased.[1105] Butz was riding the tube and Werner was driving the boat when the tube, with Butz riding, skimmed the shoreline until it slammed in a partially docked boat.[1106] As a result of these injuries Butz brought suit against Werner, Cass Oil Co. (Cass), and World Wide, Inc. (World), the sellers and distributors of the "super

1094. *Sande*, 440 N.W.2d at 268. *See* N.D. CENT. CODE § 43-12.1-14(7) (1987)(grounds for discipline and penalties). Sande's violations consisted of practicing without a license. *Sande*, 440 N.W.2d at 267-68.
1095. *Sande*, 440 N.W.2d at 268.
1096. *Id.*
1097. *Id.*
1098. *Id.*
1099. *Sande*, 440 N.W.2d at 268.
1100. *Id.* at 268-69.
1101. 438 N.W.2d 509 (N.D. 1989).
1102. Butz v. Werner, 438 N.W.2d 509, 511 (N.D. 1989).
1103. *Butz* at 513.
1104. *Id.* at 518.
1105. *Id.* at 510.
1106. *Id.*

tube" on the theories of negligence, strict products liability, and breach of warranty.[1107] The court found for Butz on the theories of strict liability and negligence, but found no breach of warranty.[1108] Cass and World appealed the trial court judgment.[1109]

In addressing the first issue, the court stated that the "relevant inquiry in a strict liability action based upon failure to warn is whether the defendant marketed a product which was unreasonably dangerous to the user because of inadequate warning."[1110] The question of whether a product is unreasonably dangerous to the user due to lack of warning is a question of fact.[1111] As a result the court determined that the trial court did not err in allowing the jury to determine whether or not the product was unsafe.[1112]

In addressing the second issue, the court cited rules 8(a) and 18(a) of the North Dakota Rules of Civil Procedure which allows parties to plead multiple claims.[1113] In refusing to declare that the trial court erred in allowing Butz to plead multiple theories, the court quoted from *Mauch* that "we believe that recovery sought under a negligent failure-to-warn theory and recovery sought under products-liability . . . are two separate and distinct theories of recovery. Thus the trial court must instruct on each. . . ."[1114]

The Supreme Court, in confronting the third issue, concluded that the trial court did not abuse its discretion. The court then stated that the determination of whether or not to admit demonstrative evidence is left to the discretion of the court and will not be overturned unless abuse is shown.[1115] Thus, the district judgment was affirmed in whole.[1116]

RAPE

STATE V. REINART

In *State v. Reinart*,[1117] Kenneth William Reinart appealed

1107. *Id.*
1108. *Id.* The case was tried before a jury and the verdict form required the jury to separately assess fault on the two theories. *Id.* The fault assessed was as follows: on the strict liability theory, World 37.5%, Cass 37.5%, Werner 0%, Butz 25%. *Id.* On the negligence theory: World 25%, Cass 25%, Werner 15%, Butz 35%. *Id.* at 511.
1109. *Id.*
1110. *Id.* (citing Mauch v. Manufacturers Sales and Service, Inc., 345 N.W.2d 338, 345 (N.D. 1984)).
1111. *Id.* (citations omitted).
1112. *Id.* at 512.
1113. *Id.* at 513. *See* N.D.R. Civ. P. 8(a), 18(a) (allow parties to plead multiple claims).
1114. *Butz*, 438 N.W.2d at 513 (quoting Mauch v. Manufacturers Sales and Service, Inc., 345 N.W.2d 338, 345 (N.D. 1984).
1115. *Id.* at 518.
1116. *Id.*
1117. 440 N.W.2d 503 (N.D. 1989).

from a jury verdict finding him guilty of gross sexual imposition of his fourteen year old stepdaughter.[1118] Reinart's stepdaughter testified that Reinart had engaged in sexual intercourse with her several times.[1119]

On appeal, Reinart argued that he should have been allowed to introduce testimony that someone else was responsible for the complainant's physical condition.[1120] The state argued that statutory and case law supported the suppression of such evidence.[1121] North Dakota's "rape shield" law provides that in any prosecution for gross sexual imposition and sexual imposition, evidence concerning the reputation of the complaining witness is not admissible to prove consent of the witness.[1122] In its argument, the state tried to use the law to exclude evidence of the stepdaughter's prior sexual activity.[1123] The supreme court noted that consent was not an issue when the complainant was less than fifteen years old and *held* that when the prosecutor introduced the physician's testimony regarding possible sexual intercourse, the defendant should have been allowed to provide an alternative explanation for the stepdaughter's physical condition.[1124]

Furthermore, the court determined that it was prejudicial error to deny the defendant the right to cross examine the complainant.[1125] The court noted that the stepdaughter's testimony was very important to the prosecution's case, but that the testimony was contradicted by her mother and the defendant.[1126]

1118. State v. Reinart, 440 N.W.2d 503, 504 (N.D. 1989). *See* N.D. CENT. CODE § 12.1-20-03(1)(d) (1987)(engaging in sexual acts with a person less than fifteen-years-old is gross sexual imposition).

1119. *Reinart*, 440 N.W.2d at 504. A physician testified that the stepdaughter had experienced "chronic blunt trauma" where a blunt instrument, such as a penis, had been pushed against her vagina. *Id.* at 505. The doctor strongly suspected that intercourse had taken place. *Id.*

1120. *Id.* At trial, Reinart's counsel asked the stepdaughter if she "had ever had sexual intercourse with anyone else," and the trial court sustained the prosecutor's objection that it was not relevant. *Id.* at 505.

1121. *Reinart*, 440 N.W.2d at 505. *See* N.D. CENT. CODE § 12.1-20-14 (1987)(which does not allow evidence of consent by complaining witness). *See also* State v. Buckley, 325 N.W.2d 169 (N.D. 1982); State v. Piper, 261 N.W.2d 650 (N.D. 1977)(both cases dealt with consent and credibility).

1122. *Reinart*, 440 N.W.2d at 506.

1123. *Id.*

1124. *Id.* at 505 (citing People v. Mikula, 269 N.W.2d at 195 (1978)). The court emphasized that in a criminal trial the sixth amendment to the United States Constitution guarantees the defendant's right to confront witnesses, and under the fourteenth amendment, the states must recognize this right. *Id.* at 506.

1125. *Reinart*, 440 N.W.2d at 506. *See* Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)(factors in determining whether a denial is harmless error include the importance of a witness's testimony, whether the testimony was cumulative, and the presence or absence of evidence of corroborating or contradicting testimony on material points).

1126. *Reinart*, 440 N.W.2d at 506.

Additionally, once the medical evidence was introduced, alternative reasons for the injuries became crucial in establishing guilt.[1127] Accordingly, the supreme court held that Reinart should have been allowed to introduce alternative reasons for the stepdaughter's injuries, and the denial of that right was not harmless beyond a reasonable doubt.[1128]

The supreme court reversed and remanded for a new trial.[1129]

SCHOOLS

DICKINSON PUBLIC SCHOOL DISTRICT V. SANSTEAD

In *Dickinson Public School Dist. v. Sanstead*,[1130] Superintendent of the Department of Public Instruction, Sanstead, and the State of North Dakota appealed from a judgment awarding $371,548.28 plus interest and costs to three public school districts.[1131] The school districts had challenged the state's method of calculating per-pupil foundation aid payments under Chapter 15-40.1 of the North Dakota Century Code.[1132] The district court determined as a matter of law that an express contract was created between the State and the school districts under the statute, and thus, the school districts' action was not barred by sovereign immunity.[1133]

A motion by the school districts to dismiss the state's appeal was denied.[1134] The supreme court noted that, while the amended order granting summary judgment was not appealable, an attempted appeal from that order was to be treated as an appeal from a subsequently entered consistent judgment.[1135]

The state contended that the school districts' action was barred by article I section 9 of the North Dakota Constitution.[1136]

1127. *Id.*

1128. *Id.* at 507. The court did not agree with Reinart's contention that the testimony of witnesses that complainant previously told them that she and Reinart had sexual intercourse was hearsay. *Id.* The court cited Rule 801(d) of the North Dakota Rules of Evidence and concluded that the testimony rebutted a charge of recent fabrication or improper motive and thus not hearsay. *Id. See* N.D.R. EVID. 801(d) (prior statements of witnesses are not hearsay if the statement is offered to rebutt a charge of recent fabrication).

1129. *Id.*

1130. 425 N.W.2d 906 (N.D. 1988).

1131. Dickinson Public School Dist. v. Sanstead, 425 N.W.2d 906, 907-09 (N.D. 1988).

1132. *Sanstead*, 425 N.W.2d at 908. *See* N.D. CENT. CODE § 15-40.1-07-09 (1987)(calculation of educational foundation program per-pupil payments)(amended 1989).

1133. *Sanstead*, 425 N.W.2d at 908-09.

1134. *Id.* at 908.

1135. *Id.* (citing Vanderhoof v. Gravel Products, Inc., 404 N.W.2d 485, 488 (N.D. 1987)).

1136. *Id. See* N.D. CONST. art. I, § 9 (providing that "[s]uits may be brought against the

No suit may be maintained against the state unless authorized by the state legislature.[1137] Also, section 32-12-02 of the North Dakota Century Code had previously been construed as barring any suit against the state that was not within the express provisions of the statute.[1138]

The North Dakota Supreme Court determined that the statute directing disbursement of appropriated funds to school districts did not create a contractual relationship.[1139] The court reasoned that the legislature could have provided that all such funds be retained by the state or that all funding for public schools be borne by the local school districts.[1140] Further, the supreme court reiterated that state aid to local school districts is a mere gratuity.[1141] Thus, because reimbursement creates no contract between the state and the school districts, the districts' claim was barred by sovereign immunity.[1142]

The court also determined that the judgment could not be sustained as a writ of mandamus or as a declaratory judgment.[1143] Mandamus was not the proper remedy to compel the undoing of acts already done.[1144] Similarly, declaratory judgments were intended to clarify the rights of parties before rights are violated.[1145] The school districts sought payment for past misdeeds, hence remand was not required and the district court judgment was reversed.[1146]

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state in such a manner, in such courts, and in such cases, as the legislative assembly may, by law, direct").

1137. *Sanstead*, 425 N.W.2d at 908 (citing Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507, 508 (N.D. 1982)).

1138. *Sanstead*, 425 N.W.2d at 908 (citing Kristensen v. Strinden, 343 N.W.2d 67, 74 (N.D. 1983); Stark County v. State, 160 N.W.2d 101, 105 (N.D. 1968)). *See* N.D. CENT. CODE § 32-12-02 (1976 and Supp. 1989)(providing that "[a]n action respecting the title to property, or arising upon contract, may be brought in the district court against the state the same as against a private person").

1139. *Sanstead*, 425 N.W.2d at 909. *See* Stark County v. State, 160 N.W.2d 101, 105 (N.D. 1968)(statute providing for the distribution of motor-vehicle registration moneys did not create a contract between the state and Stark County).

1140. *Sanstead*, 425 N.W.2d at 909 (citing Dornacker v. Olson, 248 N.W.2d 844, 849 (N.D. 1976); Todd v. Bd. of Education, 54 N.D. 235, 241, 209 N.W. 369, 371 (1926)).

1141. *Sanstead*, 425 N.W.2d at 910 (citing Zenith School District No. 32 v. Peterson, 81 N.W.2d 764, 768 (N.D. 1957)).

1142. *Sanstead*, 425 N.W.2d at 910.

1143. *Id.*

1144. *Id.* (citing State ex rel. Conrad v. Langer, 68 N.D. 167, 175, 277 N.W. 504, 509 (1937)).

1145. *Id.* *See* Allen v. City of Minot, 363 N.W.2d 553, 554 n.1 (N.D. 1985)(discussing appropriate application of the Declaratory Judgment Act in chapter 32-23 of the North Dakota Century Code).

1146. *Sanstead*, 425 N.W.2d at 910. Justice Meschke's concurring opinion disagreed with the court's procedural rationale, *i.e.*, sovereign immunity, but agreed in the result for substantive reasons, *i.e.*, that the Superintendent had correctly interpreted the applicable statutes. *Id.* at 912 (Meschke, J., concurring).

VAN INWAGEN V. SANSTEAD

In *Van Inwagen v. Sanstead*,[1147] the North Dakota Supreme Court upheld the State Superintendent of Public Instruction's denial of Joseph and Renee Van Inwagen's request for an exemption for their children from compulsory school attendance.[1148] The supreme court affirmed the district court's dismissal of the Van Inwagen's appeal of the superintendent's denial which determined that there was no statute authorizing an appeal.[1149]

The Van Inwagens relied on subsection four of section 15-34.1-03 of the North Dakota Century Code in requesting to exempt their children.[1150] The Van Inwagens initial request, made to the Hazen School Board, stated that it would be "a violation of principle and our conscience" to comply with the compulsory school law.[1151] A multidisciplinary team set up to review the situation made no recommendation to the school board on the request for exemption.[1152] The school board denied the Van Inwagen's after receiving no recommendation.[1153]

The Van Inwagen's appealed the school board's denial to the Mercer County Superintendent of Schools in accordance with section 15-22-17 of the North Dakota Century Code.[1154] After the superintendent of schools denied their request, the Van Inwagens appealed to the State Superintendent Wayne Sanstead, who also denied the request for an exemption.[1155]

The Van Inwagens appealed Sanstead's denial to the district court and Van Inwagen's appeal was dismissed for lack of jurisdiction.[1156] The district court held that there was no statutory right to appeal the decision of the State Superintendent.[1157]

In their appeal to the North Dakota Supreme Court, the Van Inwagens contended that they had a right to appeal the decision of

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1147. 440 N.W.2d 513 (N.D. 1989).

1148. Van Inwagen v. Sanstead, 440 N.W.2d 513, 514 (N.D. 1989). *See* N.D. CENT. CODE § 15-34.1-03 (1987)(exempts from compulsory attendance those children that are in such physical or mental condition that they are unable to attend regular special education).

1149. *Van Inwagen*, 440 N.W.2d at 514.

1150. *Id.*

1151. *Id.*

1152. *Van Inwagen*, 440 N.W.2d at 514. *See* N.D. CENT. CODE § 15-34.1-03(4) (1987)(multidisciplinary team required by statute).

1153. *Van Inwagen*, 440 N.W.2d at 514.

1154. *Id. See* N.D. CENT. CODE § 15-21-17 (1987)(appeal from decisions of county superintendent).

1155. *Van Inwagen*, 440 N.W.2d at 514.

1156. *Id.*

1157. *Id.* The supreme court noted that an appeal is a creature of statute and that there is no right to appeal absent statutory authority. *Id.* (citing Investment Rarities, Inc. v. Bottineau County Water Resource District, 396 N.W.2d 746 (N.D. 1986)).

the State Superintendent of Public Instruction pursuant to sections 15-21-07, 15-22-17, and 28-32-15 of the North Dakota Century Code.[1158] The supreme court did not agree with the Van Inwagen's contentions that they have a right to appeal the state superintendent's decision.[1159] The court noted that the state superintendent is not generally an administrative agency.[1160] Thus, the statute which authorizes appeals did not apply to the Van Inwagen's appeal.[1161]

Additionally, the supreme court found that although section 15-22-17 of the North Dakota Century Code provides that the decision of the state superintendent is final "subject to appropriate remedies in the courts," this does not mean that there is a general right to appeal.[1162] It only means that a separate action may be brought in the courts.[1163]

The court noted that if the legislature intended for there to be an appeal of the decision, the legislature could have provided for an appeal mechanism in a clear manner.[1164]

Therefore, the supreme court agreed with the decision of the trial court to dismiss the appeal and affirmed the judgment.[1165]

SCHOOLS AND SCHOOL DISTRICTS

COLES V. GLENBURN PUB. SCHOOL DIST. NO. 26

In *Coles v. Glenburn Pub. School Dist. No. 26*,[1166] Kevin Coles and Francine Kuznia appealed from a district court order denying

1158. *Van Inwagen*, 440 N.W.2d at 515. *See* N.D. CENT. CODE § 15-21-07 (1987)(superintendent of public instruction shall decide all appeals from decisions of county superintendent of schools); N.D. CENT. CODE § 15-22-17 (1987)(appeal to superintendent of public instruction from decisions of county superintendent and his decision is final); N.D. CENT. CODE § 28-32-15 (1987)(any party can appeal an administrative decision unless it is declared final by another statute).

1159. *Van Inwagen*, 440 N.W.2d at 515.

1160. *Id.* There are exceptions to the state superintendent not being an administrative agency when following rules dealing with section 15-21-07 and rules dealing with teacher certification or professional codes and standards. *Id.*

1161. *Id.*

1162. *Van Inwagen*, 440 N.W.2d at 515.

1163. *Id.*

1164. *Id.*

1165. *Van Inwagen*, 440 N.W.2d at 516. In a special concurrence, Justice Vande Walle noted that the lack of rules governing appeals confused the issues in this case. *Id.* at 517 (Vande Walle, J., concurring). The special concurrence stated that if the methods for appeal outlined in the statutes were outdated, the statutes should be repealed. *Id.* Section 15-21-07 had not been amended since 1961, and section 15-22-17 had not been amended since 1913. *Id.* at 516. Thus, the rules appear to need updating. *Id.* Justice Meschke concurred also, emphasizing the *Investment Rarities* decision. *Van Inwagen*, 440 N.W.2d at 518 (Meschke, J., concurring). Justice Meschke noted the majority's decision in *Van Inwagen* does not preclude testing the validity of an action by the North Dakota Superintendent of Public Instruction by seeking a special proceeding or other appropriate remedy. *Id.*

1166. 436 N.W.2d 262 (N.D. 1989).

their petition for writ of mandamus requiring the school district to issue teaching contracts to them based upon the previous year's terms.[1167] Coles' contract for 1988-89 did not include the boys' basketball head coaching position or the athletic director position.[1168] The contract also reduced Coles' base teaching salary by one-seventh.[1169] Kuznia's contract did not include her previous volleyball coaching position.[1170] The teachers petitioned for a writ of mandamus alleging breach of contract and violation of their rights under sections 15-47-27 and 15-47-38 of the North Dakota Century Code.[1171] On appeal, the plaintiffs contended that the district court erred in concluding that the school district could reduce their contracts without a nonrenewal hearing, that the reductions were not severe, and that the contracts could be reduced without mutual agreement.[1172]

The supreme court first noted that the denial of a writ is not overturned unless the trial court abused its discretion.[1173] Past decisions have construed the relevant statutes to require that the teacher receive a good faith offer of employment but not the right to an identical contract.[1174] The addition or removal of new duties is permitted without following the statutory provisions provided for nonrenewal of a teacher's contract.[1175] However, when the adjustment of duties results in a severe reduction in salary for curricular activities, the nonrenewal procedures must be followed.[1176]

The supreme court concluded that the athletic director position was not distinguishable from Coles' other curricular duties, and his pay reduction was severe.[1177] Thus, the nonrenewal pro-

1167. Coles v. Glenburn Pub. School Dist. No. 26, 436 N.W.2d 262, 262 (N.D. 1989). Coles was employed for the 1988-89 school year as a teacher, boys' basketball head coach (paying an additional $1908.52), and athletic director (an additional $636.17). *Id.* Kuznia was employed in 1987-88 as a teacher, fifth and sixth grade girls' basketball coach, and volleyball coach ($795.22). *Id.* at 263.

1168. *Coles*, 436 N.W.2d at 263.

1169. *Id.*

1170. *Id.*

1171. *Id.* *See* N.D. CENT. CODE § 15-47-27 (1981 and Supp. 1989)(providing that teachers be notified in writing not later than May first if their contracts are not to be renewed for the ensuing year, and if not notified, their contracts are renewed under the previous year's terms and conditions) and § 15-47-38(5)(1981 and Supp. 1989)(providing that teachers must be notified of nonrenewal by April 15, given reasons for nonrenewal and informed of a special school board meeting to discuss and act on the nonrenewal).

1172. *Coles*, 436 N.W.2d at 263.

1173. *Id.* (citing Bradley v. Beach Pub. School Dist. No. 3, 427 N.W.2d 352 (N.D. 1988)).

1174. *Coles*, 436 N.W.2d at 264 (discussing Engstad v. N. Cent. of Barnes Pub. School Dist. No. 65, 268 N.W.2d 126, 134 (N.D. 1978)).

1175. *Coles*, 436 N.W.2d at 264 (discussing Quarles v. McKenzie Pub. School Dist. No. 34, 325 N.W.2d 662, 667 (N.D. 1982)).

1176. *Coles*, 436 N.W.2d at 264.

1177. *Id.*

cedures were required.[1178] The coaching positions of both Coles and Kuznia were extracurricular and the district reassignment of those positions without following nonrenewal procedures was reasonable.[1179]

The teachers contended that any changes to a contract must be made by mutual agreement between the teacher and the administration according to their negotiated master contract.[1180] However, the supreme court agreed with the district court that this language refers to changes in a current contract, not to offers for new contracts.[1181]

The order appealed from was affirmed with regard to the coaching positions.[1182] The order was reversed regarding Coles' athletic director position.[1183] Because it was too late for effectual writ of mandamus, the matter was remanded to determine compensatory damages.[1184]

SEARCH & SEIZURE

STATE V. DAHL

In *State v. Dahl*,[1185] Dahl appealed from a conviction of possession of a controlled substance with intent to manufacture or deliver.[1186] Marijuana was discovered during the search of Dahl's premises resulting from a search warrant to recover stolen goods.[1187] The search warrant had been obtained due to the admission of an informant who was allegedly involved in a burglary.[1188] However, during the hearing to issue the search warrant, the magistrate was not told that the informant was currently incarcerated or that he had been told he would not be prosecuted with regard to the information he gave.[1189] Dahl's pre-trial

1178. *Id.*

1179. *Id.* It has been held that coaching is not teaching, and thus not subject to nonrenewal provisions. *Id.* at 264, n.2. The court declined to address the issue. *Id.*

1180. *Id.* at 265.

1181. *Coles*, 436 N.W.2d at 265.

1182. *Id.*

1183. *Id.*

1184. *Id.* (citing Selland v. Fargo Pub. School Dist. No. 1, 285 N.W.2d 567, 575 (N.D. 1979)).

1185. 440 N.W.2d 716 (N.D. 1989).

1186. State v. Dahl, 440 N.W.2d 716, 717 (N.D. 1989).

1187. *Dahl*, 440 N.W.2d at 717. The theft for which the search warrant applied involved the burglary of a custom-made couch, as well as other items from a farmstead used as a hunting lodge. *Id.*

1188. *Id.* The informant was given immunity from prosecution regarding the information he gave about the robbery, including the whereabouts of several stolen articles. *Id.*

1189. *Dahl*, 440 N.W.2d at 717. The sheriff did testify on direct examination and when answering questions to the court as to the informant's reliability. *Id.*

motion for suppression of the evidence obtained in the search was denied.[1190] Dahl was convicted by the district court and appealed to the North Dakota Supreme Court.[1191] The primary issue on appeal was whether the search warrant was sufficiently reliable so as to show probable cause.[1192] The supreme court stated that the totality-of-the-circumstances test was the proper review for probable cause.[1193] The court also stated that the reliability of an informant is pertinent to the determination of probable cause, especially when the informant is a member of the "criminal milieu."[1194] In furtherance of those statements, the court indicated it would have been preferable that the sheriff had informed the magistrate of the circumstances; however, testimony given by the sheriff at the hearing with regard to the informant's reliability was sufficient to show probable cause.[1195] Therefore, the supreme court affirmed the conviction of the district court.[1196]

STATE V. HANDTMANN

In *State v. Handtmann*,[1197] Mark Handtmann and Sheila Fuhrman appealed their convictions for drug-related offenses after the district court denied their motions to suppress evidence seized

1190. *Id.* Dahl asserted that the information provided by the informant was insufficient to show probable cause and, as such, the warrant should not have been granted and the evidence obtained should be suppressed. *Id.* at 717-18.

1191. *Id.* at 717.

1192. *Id.* at 718. Dahl claims that the sheriff's failure to advise the magistrate of the informant's incarceration and promised immunity was an intentional omission equivalent to a false statement. *Id.* Dahl also contended that because the informant was a criminal, the veracity requirements of Aguilar-Spinelli should be strictly applied. *Id.* However, the supreme court dismissed the Aguilar-Spinelli argument by indicating that the "totality-of-the-circumstances test" had been adopted and the veracity test of Aguilar-Spinelli no longer governed. *Id.*

1193. *Id.* The totality-of-the-circumstances test was adopted in State v. Ringquist, 433 N.W.2d 207, 211 (N.D. 1988). North Dakota's standard is now the same standard required by the Fourth Amendment to the United States Constitution as set forth in Illinois v. Gates:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing] that probable cause existed.

462 U.S. 213, 238-39 (1983).

1194. *Dahl*, 440 N.W.2d at 718 (quoting W. LAFAVE, SEARCH AND SEIZURE § 3.3 at 611 (2nd ed. 1987)). The reliability of a criminal informant must be established as opposed to the presumption given to "upstanding citizens." *Dahl*, 440 N.W.2d at 718.

1195. *Dahl*, 440 N.W.2d 719-20. At the hearing the sheriff testified as to several reasons why he felt the informant was reliable, including several facts that " 'only someone who was present at the time of the burglary could determine.' " *Id.* at 719.

1196. *Id.* at 720. The court ruled that in light of the testimony of the sheriff regarding the detailed accuracy of the informant, the informant was sufficiently reliable and the warrant was issued with probable cause. *Id.*

1197. 437 N.W.2d 830 (N.D. 1989).

from their home during a search conducted pursuant to a search warrant.[1198]

The application for the search warrant was based upon testimony by the deputy chief of police, Detective Bullinger.[1199] Bullinger testified that Handtmann was " 'suspected of trafficking in narcotics.' "[1200] Bullinger inaccurately reported that Handtmann had an automatic rifle when Handtmann had actually reported the gun had been stolen.[1201] The detective also inaccurately reported that Handtmann had been seen at a known narcotic-dealing residence and was storing chemicals at his mother's home.[1202] Search warrants were issued and the police found drug paraphernalia, marijuana, and over $14,000 in cash at Handtmann's home.[1203]

Handtmann and another defendant, Sheila Fuhrman, moved to suppress the evidence contending that there was no probable cause for the search and that officials had given false evidence in support of the warrant.[1204] The district court denied the motion to suppress the evidence concluding that there was sufficient evidence to establish probable cause, even excluding the detective's false statements.[1205] Further, even if probable cause did not exist, the police did not act in bad faith and inevitably the evidence would have been discovered.[1206]

On appeal, the defendants contended that insufficient evidence was presented to establish probable cause.[1207] In assessing the sufficiency of the evidence for establishing probable cause, the North Dakota Supreme Court has adopted the totality-of-the-circumstances test.[1208] In *Handtmann*, there was not a substantial

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1198. State v. Handtmann, 437 N.W.2d 830, 831 (N.D. 1989).

1199. *Handtmann*, 437 N.W.2d at 831. An anonymous female informant said she had seen marijuana at the Begleys' house on two occasions, she knew the location of the house and provided a description of their cars, someone with a blue car was currently leaving marijuana at the home, and the person would be making other deliveries. Bullinger located the house and cars. The blue car was registered to Jeff Stockert. Bullinger eventually followed Stockert to Handtmann's home. *Id.*

1200. *Handtmann*, 437 N.W.2d at 832.

1201. *Id.*

1202. *Id.*

1203. *Id.* at 833.

1204. *Handtmann*, 437 N.W.2d at 833.

1205. *Id.*

1206. *Id.*

1207. *Id.* at 833-34. The claim was based on an alleged violation of the Fourth and Fourteenth Amendments of the United States Constitution and article I, § 8 of the North Dakota Constitution. *Id.* The defendants alleged that the anonymous informant's veracity or basis of knowledge was not established, that none of the informant's information directly implicated them, and that Bullinger's false statements were made intentionally or with reckless disregard for the truth. *Handtmann*, 437 N.W.2d at 834.

1208. *Id.* at 834 (citing State v. Ringquist, 433 N.W.2d 207, 211)(N.D. 1988)). Probable cause exists if certain objects probably connected with criminal activity are in a certain place. *Ringquist*, 433 N.W.2d at 212. The *Ringquist* decision followed the federal standard

basis for believing that criminal evidence would probably be found at the defendant's house because the informant did not implicate the defendants.[1209] North Dakota cases have consistently required more than unsupported conclusions or statements about reputation to establish probable cause.[1210] Evidence of reputation in conjunction with other evidence may support finding probable cause.[1211] In this case, the false information and conclusions about Handtmann may have created suspicion, but suspicion does not amount to probable cause.[1212] There was no substantial basis for issuing the search warrant, and thus, the evidence was illegally obtained.[1213]

The court declined to apply the inevitable discovery rule because a search warrant cannot be validated by information not revealed to the magistrate or by information subsequently discovered.[1214] Application of the doctrine in this case would encourage law enforcement shortcuts and incomplete police investigation.[1215]

The convictions were reversed and the case remanded.[1216]

STATE V. HANSEN

In *State v. Hansen*,[1217] the North Dakota Supreme Court held that in accidents involving death or serious bodily injury, a motorist must be placed under arrest before obtaining a sample of blood.[1218]

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adopted in Illinois v. Gates, 462 U.S. 213, 238-39 (1983). Under the totality-of-the-circumstances test, "bare-bones" conclusions continue to be insufficient for establishing probable cause. *Ringquist*, 433 N.W.2d at 213.

1209. *Handtmann*, 437 N.W.2d at 834-35. The specific information about Handtmann represented only unsupported conclusions. *Id.* at 835. *See* 1 W. LAFAVE, SEARCH AND SEIZURE § 3.2 (2d ed. 1987).

1210. *Handtmann*, 437 N.W.2d at 835. *See* State v. Thompson, 369 N.W.2d 363 (N.D. 1985); State v. Schmeets, 278 N.W.2d 401 (N.D. 1979)(conclusory statements without additional supporting circumstances are insufficient).

1211. *Handtmann*, 437 N.W.2d at 835 (citing *Ringquist*, 433 N.W.2d at 211; State v. Ronngren, 361 N.W.2d 224 (N.D. 1985)).

1212. *Handtmann*, 437 N.W.2d at 835.

1213. *Handtmann*, 437 N.W.2d at 836. The State argued that the search could be validated under the inevitable discovery exception to the exclusionary rule, relying on testimony given at the suppression hearing, and the subsequent seizure of marijuana. *Id.* The exclusionary rule requires suppression of evidence obtained in a search violating the Fourth Amendment. *Id.* The exclusionary rule is extended in the "fruit-of-the-poisonous-tree" doctrine which prohibits even indirect use of information obtained through illegal searches or seizures. *Id.* However, such evidence is not inadmissible if it is shown that it would have been inevitably discovered without the unlawful search or seizure. *Id.*

1214. *Handtmann*, 437 N.W.2d at 838 (citing Whitely v. Warden, 401 U.S. 560 (1971); United States v. Griffin, 502 F.2d 959 (6th Cir.) *cert. denied*, 419 U.S. 1050 (1974)).

1215. *Handtmann*, 437 N.W.2d at 838.

1216. *Id.*

1217. 444 N.W.2d 330 (N.D. 1989).

1218. State v. Hansen, 444 N.W.2d 330, 334 (N.D. 1989).

James E. Hansen was the driver of a motorcycle which collided with an automobile in Morton County.[1219] A passenger on the motorcycle died and Hansen had his right hand severed above the elbow.[1220] Hansen was taken to the hospital and hospital personnel took a blood sample from Hansen before he went into the operating room prior to any arrest.[1221] After the sample was taken, the patrolman was permitted to see Hansen. The patrolman placed him under arrest for driving while under the influence of alcohol.[1222]

The trial court suppressed the blood test results, concluding that section 39-20-01.1 of the North Dakota Century Code required that before a blood sample may be taken, an individual must be placed under arrest.[1223] The state appealed, contending that there was no constitutional requirement of arrest.[1224]

The North Dakota Supreme Court noted that the North Dakota implied consent statute required, absent consent, an individual be arrested prior to obtaining a blood sample.[1225]

The court determined that section 39-20-01.1 of the North Dakota Century Code was ambiguous and looked at legislative history in determining its intent.[1226] The court examined testimony given at a legislative hearing on the statute and concluded that it did not dispense with the requirement for arresting an individual before obtaining a blood sample.[1227] The court noted that there is a constitutional requirement for arrest prior to obtaining a blood sample and that an arrest is not too great of a burden when weighed against constitutional liberties.[1228]

The supreme court concluded that the legislature could have specifically stated its intention to require the test without an arrest.[1229]

1219. *Hansen*, 444 N.W.2d at 330.

1220. *Id.*

1221. *Id.*

1222. *Id.* at 331. *See* N.D. CENT. CODE § 39-08-01 (1987)(driving under the influence of alcohol).

1223. *Id. See* N.D. CENT. CODE § 39-20-01.1 (1987)(if there is probable cause that a driver is under the influence in an accident resulting in death or serious bodily injury, a blood, breath, saliva, or urine sample may be obtained).

1224. *Hansen*, 444 N.W.2d at 331.

1225. *Id. See* State v. Anderson, 336 N.W.2d 634 (N.D. 1983)(court held that absent consent, arrest is required prior to obtaining a blood sample); N.D. CENT. CODE § 39-20-01 (1987)(individual must be arrested before a blood sample can be taken).

1226. *Id. See* N.D. CENT. CODE § 39-20-01.1 (1987)(if there is probable cause to believe a driver is under the influence he may be compelled to submit to a blood test).

1227. *Hansen*, 444 N.W.2d at 332. The court also stated that serious constitutional questions arise if there were not an arrest requirement. *Id.*

1228. *Id.* at 333.

1229. *Id.* The court found, if faced with two possible interpretations of the statute, the

Therefore, since section 39-20-01.1 of the North Dakota Century Code requires an arrest prior to obtaining a blood sample, the trial court's decision to suppress the results of Hansen's blood test was affirmed.[1230]

STATE V. RINGQUIST

In *State v. Ringquist*,[1231] the State of North Dakota appealed a district court order suppressing evidence obtained during a search of Ringquist's apartment pursuant to a search warrant.[1232] The county court determined that the following evidence gave probable cause to issue the warrant: police identification of Ringquist's residence, car and physical characteristics; two confidential informants who connected Ringquist with selling drugs; and another anonymous caller furnishing information relating to drug traffic at Ringquist's apartment.[1233] Officers seized cocaine and marijuana from Ringquist's apartment and Ringquist was charged.[1234] Ringquist subsequently moved to suppress the evidence, claiming that there was not probable cause to issue the search warrant under the United States and North Dakota Constitutions.[1235] The district court granted Ringquist's motion, concluding that the evidence did not provide good cause.[1236] On appeal, the State argued that

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constitutional one which effectuates the legislative purpose will be adopted, even though it is not as natural as the unconstitutional one. *Id.*

1230. *Id.*

1231. 433 N.W.2d 207 (N.D. 1988).

1232. *State v. Ringquist*, 433 N.W.2d 207, 208 (N.D. 1988).

1233. *Ringquist*, 433 N.W.2d at 208-09.

1234. *Id.* at 209.

1235. *Id.* at 209-210. The fourteenth amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV. Article I, § 8 of the North Dakota Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

N.D. CONST. art. I, § 8.

1236. *Ringquist*, 433 N.W.2d at 210. The North Dakota Supreme Court traced the history of the U.S. Supreme Court decisions dealing with the establishment of probable cause for issuing a search warrant. *Id.* The Supreme Court had held that a search warrant could not be issued upon purely conclusory statements that probable cause existed. Nathanson v. United States, 290 U.S. 41 (1933). Hearsay could serve as a basis for a search warrant if there was a substantial reason for crediting the hearsay. Jones v. United States, 362 U.S. 257 (1960). The court refined how to evaluate hearsay with a two-pronged test in *Aguilar v. State of Texas*, 378 U.S. 108 (1964). The test required that the magistrate must know enough of the circumstances to determine that the informant's observations were accurate ("basis of knowledge" prong) and that the informant was credible or his information reliable ("veracity" prong). *Id.* The Supreme Court later suggested that

the warrant was supported by probable cause.[1237]

The North Dakota Supreme Court noted that their analysis under the fourth amendment was controlled by the *Gates* totality-of-the-circumstances test.[1238] The court also adopted the *Gates* test for assessing probable cause under article I, section 8 of the North Dakota Constitution.[1239] In making this decision, the court approved "the interrelationship of the standard of proof necessary to establish probable cause with the flexibility of the totality-of-the-circumstance test."[1240] The court agreed with the *Gates* rationale that probable cause is a "fluid concept" that depends on assessing probabilities within each fact situation rather than applying a rigid, technical set of rules.[1241] The court also noted that the guidelines provided by *Aguilar-Spinelli* should continue to provide helpful input for an informed decision even though a more flexible test is desirable.[1242]

The court applied the information available in Ringquist's case to the probable cause determination using *Gates*.[1243] First, information must be timely so that probable cause to search exists at the time the warrant is issued.[1244] Staleness of information depends upon the nature of the crime and whether the activity is

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deficiencies in either prong could be satisfied by police corroboration. *Spinelli v. United States*, 393 U.S. 410 (1969). The veracity prong could be met by establishing the informant's inherent credibility; the basis of knowledge prong could be satisfied by provision of enough detail by the informant. *Id.*

The Court abandoned the *Aguilar-Spinelli* test and reaffirmed the totality-of-the-circumstances analysis. Illinois v. Gates, 462 U.S. 213, 238-39 (1983). The Court noted that veracity and basis of knowledge were each relevant but that courts should view the prongs as intertwined so that a deficiency in either may be compensated by a stronger showing in the other. *Id.*

1237. *Ringquist*, 433 N.W.2d at 210.

1238. *Id.* at 212.

1239. *Id.* The court noted that the state may go beyond the safeguards enumerated in the Federal Constitution. State v. Thompson, 369 N.W.2d 363 (N.D. 1985); State v. Stockert, 245 N.W.2d 266 (N.D. 1976). Other jurisdictions and scholars have criticized *Gates*. *E.g.*, State v. Jones, 706 P.2d 317 (Alaska 1985); State v. Kimbro, 496 A.2d 498 (1985); 1 W. LAFAVE, SEARCH AND SEIZURE § 3.3 (Supp. 1984).

However, the North Dakota Supreme Court decided to join the majority of jurisdictions adopting *Gates* as state constitutional law. *E.g.*, People v. Pannebaker, 714 P.2d 904 (Col. 1986); State v. Lang, 672 P.2d 561 (1983); Potts v. State of Maryland, 479 A.2d 1335 (1984).

1240. *Ringquist*, 433 N.W.2d at 212. *See* State v. Mondo, 325 N.W.2d 201 (N.D. 1982)(describing the lesser standard of proof required for probable cause compared to conviction at trial).

1241. *Ringquist*, 433 N.W.2d at 212-13.

1242. *Id.* at 213 (citing United States v. Sorrels, 714 F.2d 1522, 1528-29 (11th Cir. 1983)(usefulness of the *Aguilar* test in providing guidelines for determining the existence of probable cause)).

1243. *Ringquist*, 433 N.W.2d at 213.

1244. *Id.* (citing State v. Mondo, 325 N.W.2d at 201). A warrant based on "stale information" is insufficient because the conduct may not be continuing. *E.g.*, United States v. Weinrich, 586 F.2d 481 (5th Cir. 1978) *cert. denied*, 441 U.S. 927 (1979). Staleness must be decided on the facts of each case. United States v. Hyde, 574 F.2d 856 (5th Cir. 1978).

isolated or continuing.[1245] Continuous activity is inherent in drug activity.[1246] In Ringquist's case, although the information pertained to activities occurring from one to four months before the warrant was issued, the magistrate could properly rely on it to the extent that it established a connection with drug trafficking.[1247] In this case, the anonymous informant provided information with sufficient detail. Further, the police independently investigated and confirmed that Ringquist's cable television had recently been disconnected, indicating that he might leave town.[1248] Although each piece of information by itself may not establish probable cause, probable cause is the "sum" of the information synthesized by trained police officers.[1249]

Viewing the evidence under the totality-of-the-circumstances, the magistrate had a substantial basis to determine that probable cause existed.[1250] Thus, the district court erred in suppressing the evidence and the case was remanded.[1251]

1245. *Ringquist*, 433 N.W.2d 213-214 (quoting Bastida v. Henderson, 487 F.2d 860, 864 (5th Cir. 1973)(providing a rule for determining staleness depending on whether the activity is continuous or not)).

1246. *Ringquist*, 433 N.W.2d at 214 (citing United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984) *cert. denied* 472 U.S. 1017 (1985)).

1247. *Ringquist*, 433 N.W.2d at 214.

1248. *Id. Cf.* State v. Thompson, 369 N.W.2d 363 (N.D. 1985)(police officer's affidavit did not provide a substantial basis for supporting probable cause because the anonymous tip did not disclose any specific facts).

1249. *Ringquist*, 433 N.W.2d at 215 (quoting United States v. Edwards, 577 F.2d 883, 895 (5th Cir. 1978)(en banc) *cert. denied*, 439 U.S. 968 (1978)).

1250. *Ringquist*, 433 N.W.2d at 216.

1251. *Id.* Justice Vande Walle concurred. He agreed that the warrant was issued with probable cause under *Aguilar-Spinelli*. However, even if not necessary, it was time to determine whether to adopt *Gates*. He concluded that the application of *Gates* will not significantly dilute the rights of North Dakota citizens. He interpreted *Gates* as confirming a " 'common sense interpretation' " of the evidence. *Ringquist*, 433 N.W.2d at 216-217 (Vande Walle, J., concurring). Whether probable cause exists depends on the facts of each case. State v. Berger, 285 N.W.2d 533, 536 (N.D. 1979).

Justice Levine argued that the state should provide greater protection for its citizens under the state constitution than under the federal constitution. She noted that the history of the state constitution's adoption revealed an intent to broaden the basic rights of North Dakota citizens. *See* Boughey, *An Introduction to North Dakota Constitutional Law: Contents and Methods of Interpretation*, 63 N.D.L. REV. 157, 255-59 (1987). Further, as a matter of public policy, Justice Levine believed that the state should offer more protection because of the dilution of the *Aguilar-Spinelli* standards. The *Aguilar-Spinelli* probable cause test is worth preserving because it provides clearly expressed and reviewable guidelines as opposed to the "standardless standards" and "guideless guidelines" of the *Gates* test. The *Gates* decision was in response to a misapplication of the *Aguilar-Spinelli* test, a situation which was not occurring in North Dakota. Law enforcement officers in North Dakota had educated themselves to comply with *Aguilar-Spinelli*. Now they are given only an "amorphous standard." In *Ringquist*, the *Aguilar-Spinelli* test was met; the basis-of-knowledge prong was met because it was based on firsthand observation and the veracity prong was met because the information was corroborated by police investigation. Hence, Justice Levine concurred in the reversal but dissented from the adoption of *Gates* as a matter of state constitutional law. *Ringquist*, 433 N.W.2d at 217-220 (Levine, J., concurring and dissenting).

SEXUAL ASSAULT

OSLAND V. OSLAND

In *Osland v. Osland*[1252] both parties appealed the judgment of the trial court in a sexual abuse case.[1253] The issues appealed by the defendant (John Osland) were whether the assault and battery action brought by his daughter should be barred by the statute of limitations and whether his daughter failed to establish that she was sexually abused.[1254] The issue brought on cross-appeal by the plaintiff (Rebecca Osland) was whether the determination of damages was inadequate.[1255] From 1973 to 1978, Rebecca Osland was allegedly sexually abused by her father.[1256] In February of 1985, Rebecca commenced this action against her father for assault and battery.[1257] Her father claimed that this action should be barred by the two-year statute of limitations.[1258] The trial court did not allow the defense and awarded the plaintiff $12,000.[1259]

The North Dakota Supreme Court first looked at the issue of whether the action was barred by the statute of limitation.[1260] The assault and battery took place when Rebecca was a minor between the ages of ten and fifteen.[1261] Generally, the statute begins to run at the time of the wrongful act that gave rise to the action.[1262] However, when a person entitled to bring an action is under eighteen, the cause of action does not accrue during the period of minority.[1263] Under section 28-01-25 of the North Dakota Century Code, Rebecca's claim did not accrue until she was nineteen.[1264] However, Rebecca did not bring this action until she was twenty-two, three years after her nineteenth birthday.[1265]

Rebecca claimed that because of severe emotional trauma she

1252. 442 N.W.2d 907 (N.D. 1989).
1253. Osland v. Osland, 442 N.W.2d 907, 908 (N.D. 1989).
1254. *Osland*, 442 N.W.2d at 908.
1255. *Id.*
1256. *Id.*
1257. *Id.*
1258. *Id.* at 908, 909. In North Dakota the statute of limitations for assault and battery is two years. N.D. CENT. CODE § 28-01-18(1) (1974 & Supp. 1989).
1259. *Osland*, 442 N.W.2d at 908, 909.
1260. *Id.* at 908-09.
1261. *Id.* at 908.
1262. *Id.* (citing Fox v. Higgins, 149 N.W.2d 369 (N.D. 1967)).
1263. *Id. See* N.D. CENT. CODE § 28-01-25 (1974 & Supp. 1989)(lists certain disabilities that extend the statute of limitations).
1264. *Osland*, 442 N.W.2d at 908. North Dakota Century Code section 28-01-25 states that the statute of limitations cannot "be extended in any case longer than one year after the disability ceases." N.D. CENT. CODE § 28-01-25 (1974 & Supp. 1989).
1265. *Osland*, 442 N.W.2d at 908.

did not fully discover she had a claim, thus the discovery rule should be applied.[1266] The discovery rule "tolls the statute of limitations until the plaintiff knows, or with reasonable diligence should know, that a potential claim exists."[1267] Because this was a question of fact, the court refused to find that the trial court's determination was "clearly erroneous."[1268] Because Rebecca was not able to understand or discover her cause of action, the discovery rule should apply. Regarding the issue of proving sexual abuse, the supreme court held the trial court's finding of sexual abuse was not clearly erroneous.[1269]

On the issue of punitive damages, the supreme court summarily decided that the trial court had not "abused its discretion and thereby effected an injustice" by not awarding punitive damages.[1270] As to the issue of damages for emotional distress, the court stated that this was also a question of fact.[1271] This would not be set aside unless it was "clearly erroneous" or so "inadequate as to be without support in the evidence."[1272] Therefore, the court concluded that the trial court had not made a mistake, and the amount of damages would not be set aside.[1273]

TAXATION

PETERSON V. HEITKAMP

In *Peterson v. Heitkamp*,[1274] the issue was whether oil produced during the twelve month period required to qualify for an oil tax exemption was subject to an oil extraction tax.[1275] To qualify for an exemption, land must be stripper well property, and meet certain requirements twelve months preceding the exemption.[1276]

1266. *Id.*

1267. *Id.* at 909 (citing Wall v. Lewis, 393 N.W.2d 758 (N.D. 1986)).

1268. *Osland*, 442 N.W.2d at 909. N.D.R. CIV. P. 52(a) (1989)(a finding of fact will not be set aside by an appellate court unless clearly erroneous).

1269. *Osland*, 442 N.W.2d at 909.

1270. *Id.*

1271. *Id.* (citing Amerada Hess Corp. v. Furlong Oil & Minerals Co., 348 N.W.2d 913 (N.D. 1984)).

1272. *Id.* at 909-10.

1273. *Id.* at 910 (citing F-M Potatoes, Inc. v. Suda, 259 N.W.2d 481 (N.D. 1977); Radspinner v. Charles Worth, 369 N.W.2d 109 (N.D. 1985)).

1274. 442 N.W.2d 219 (N.D. 1989).

1275. Peterson v. Heitkamp, 442 N.W.2d 219, 219 (N.D. 1989).

1276. *Peterson*, 442 N.W.2d at 220. Section 57-51.1-02 of the North Dakota Century Code provides for an oil extraction tax and section 57-51.1-03(2) of the North Dakota Century Code provides for an exemption from the tax for "stripper well property." *See* N.D. CENT. CODE § 57-51.1-08 (1987)(definition of stripper well property); N.D. CENT. CODE § 57.1-51.1-02 (1987)(oil extraction tax); N.D. CENT. CODE § 57-51.1-03 (exemption for stripper well property).

The North Dakota State Tax Commissioner assessed an oil extraction tax against James Peterson and Ashland Oil, including in it tax on oil produced during the twelve month qualifying period.[1277] After a series of administrative appeals, the district court affirmed the tax commissioner's decision and Peterson and Ashland Oil appealed.[1278]

The tax commissioner asserted on appeal that only oil produced after the twelve month qualification period was exempt from the tax, whereas Peterson and Ashland Oil contended that oil produced during the period was also exempt.[1279]

The North Dakota Supreme Court found the legislative intent to be apparent from the face of the statute, and followed the rule of liberal interpretation to explain the meaning of the statute.[1280]

The court noted that both parties found the statue unambiguous, and agreed with the tax commissioner's assertion that the meaning of "preceding" in the statute was "occur prior to" the property becoming a stripper well.[1281]

Peterson and Ashland Oil argued that the twelve month qualification period was not a prerequisite, but simply an identification of a stripper well property.[1282] The supreme court stated that to interpret the statute in the method Peterson and Ashland Oil suggested would, in effect, create a refund during the qualifying period.[1283] The court found that the legislature did not intend the exemption to include the twelve month qualifying period and affirmed the judgment.[1284]

TRADE REGULATION

FARGO WOMEN'S HEALTH V. FM WOMEN'S HELP

In *Fargo Women's Health v. FM Women's Help*,[1285] an anti-abortion clinic was found liable for damages to an abortion clinic for violating a false advertising statute.[1286] Fargo Women's

1277. *Peterson*, 442 N.W.2d at 220.
1278. *Id.*
1279. *Id.* The supreme court noted that one claiming the tax exemption has the burden of proving it, and the statute will be strictly construed against the claimant. *Id.* at 221 (citing Minot Farmers Elevator v. Conrad, 386 N.W.2d 463, 466 (N.D. 1989)).
1280. *Peterson*, 442 N.W.2d at 221.
1281. *Id.*
1282. *Id.*
1283. *Id.* at 221-22.
1284. *Id.* at 222.
1285. 444 N.W.2d 683 (N.D. 1989).
1286. Fargo Women's Health v. FM Women's Help, 444 N.W.2d 683, 683 (N.D. 1989). *See* N.D. CENT. CODE Chapter 51-12 (1987)(false advertising is a class B misdemeanor).

Health Organization operated an abortion clinic.[1287] The FM Women's Help and Caring Connection provided pregnancy tests and anti-abortion counseling.[1288] In *Fargo Women's Health Org. v. Larson*,[1289] the North Dakota Supreme Court found that the owners and directors of FM Women's Help and Caring Connection were in contempt of court for violating an injunction prohibiting false advertising.[1290] The advertising consisted of using a similar name as the abortion clinic, thereby misleading people through their advertising into believing that the group provided abortions, and then counseling persons seeking abortions to not have them.[1291] The issue before the North Dakota Supreme Court was whether the abortion clinic could recover damages from the anti-abortion counseling clinic for the violation of the false advertising statute.[1292]

The trial court had determined that there had been a decline in the abortion clinic's business and that they had to counteract the Help Clinic's advertising.[1293] The jury assessed proximately caused damages in the amount of $23,500 and punitive damages of $5,500.[1294]

The Help Clinic appealed, asserting that Chapter 51-12 of the North Dakota Century Code only allows criminal penalties and injunctions, and did not allow damage claims.[1295]

The supreme court noted that there may be both a criminal prosecution and a civil tort action for the same act.[1296] The court found that Chapter 51-12 of the North Dakota Century Code was a consumer protection statute and should be construed liberally to protect the consumers.[1297]

The court found strong public policy reasons for the statute and concluded that one injured by a violation of the statute may

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1287. *Fargo Women's Health*, 444 N.W.2d at 683. The underlying facts and assertions are the same to those in *Fargo Women's Health Organization v. Larson*. *Id.* *See* Fargo Women's Health Org. v. Larson, 381 N.W.2d 176 (N.D. 1986), *cert. denied*, 476 U.S. 1108 (1986)(North Dakota Supreme Court affirmed a district court order finding the anti-abortion clinic in contempt).

1288. *Fargo Women's Health*, 444 N.W.2d at 683.

1289. 381 N.W.2d at 176 (N.D. 1986).

1290. Fargo Women's Health Org. v. Larson, 381 N.W.2d at 176, 183 (N.D. 1986), *cert. denied*, 476 U.S. 1108 (1986).

1291. *Fargo Women's Health*, 444 N.W.2d at 684.

1292. *Id.* at 683.

1293. *Id.* at 684.

1294. *Id.*

1295. *Fargo Women's Health*, 444 N.W.2d at 684.

1296. *Id.*

1297. *Id.* at 685 (citing State *ex rel.* Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 903 (N.D. 1986)).

bring an action for damages incurred by false advertising.[1298] The court noted that the two elements needed for a cause of action, wrongful conduct and damages, were present.[1299] Additionally, the court found that there was no necessity for a tort to have a name and that there was not error in allowing the punitive damages.[1300]

The judgment was affirmed.[1301]

TRUSTS

BLACK V. PETERSON

In *Black v. Peterson*,[1302] H.N. Peterson, the legal guardian of Franklin C. Black, was held to have violated a confidential relationship he had with Black when he acquired ownership in farmland that Black's grandmother had originally given Black.[1303]

Black lived with his grandmother, Ellen Magnuson, until he was nine years old, after which time Black lived with H.N. Peterson, who became his legal guardian until he was seventeen years old.[1304] Without Black's knowledge, Magnuson conveyed farmland to Black in 1971, reserving a life estate.[1305] To obtain a loan from Magnuson, Black assigned the interest back to her at Peterson's insistence.[1306] In October of 1980, Magnuson executed a will leaving the land to Peterson. Magnuson died in 1981.[1307]

The trial court found that the land conveyed for $25,000 was actually worth $298,605.[1308] The trial court determined that Peterson and Magnuson had failed to act in good faith and had violated Black's trust in them which had been created by a confidential relationship.[1309] Consequently, the trial court concluded

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1298. *Fargo Women's Health*, 444 N.W.2d at 685.

1299. *Id.* The jury found wrongful conduct by the anti-abortion clinic and awarded damages to the abortion clinic. *Id.*

1300. *Fargo Women's Health*, 444 N.W.2d at 686.

1301. *Id.* Justice VandeWalle concurred, explicitly stating that he did not believe that every act of the legislature resulted in a private cause of action. *Id.* at 687. The concurrence stated that if the plaintiff was entitled to damages, it would be under wrongful interference with business or occupation. *Id.* The concurrence believed that the jury should have been instructed that the action was for wrongful interference of business as a result of the false advertising. *Id.* at 688. However, the concurrence found that the distinction would not alter the result and therefore concurred. *Id.*

1302. 442 N.W.2d 426 (N.D. 1989).

1303. Black v. Peterson, 442 N.W.2d 426, 427 (N.D. 1989).

1304. *Black*, 442 N.W.2d at 427.

1305. *Id.*

1306. *Id.* Black testified that generally he did not read any documents Peterson asked him to sign. *Id.*

1307. *Black*, 442 N.W.2d at 427.

1308. *Id.* at 428.

1309. *Black*, 442 N.W.2d at 429.

that the land was held in an implied trust by both Magnuson and Peterson for the benefit of Black.[1310] The trial court held that Black was the owner of the farmland and directed Peterson to deliver an accounting of his trusteeship of the land.[1311] Peterson appealed.[1312]

On appeal, Peterson argued that the trial court's determination that he held a confidential relation with Black was clearly erroneous.[1313] The North Dakota Supreme Court noted that it would not overturn the trial court's findings unless the supreme court felt a definite mistake was made.[1314] The court determined there was a confidential relationship because Magnuson was Black's grandmother and Peterson was Black's legal guardian, noting that family relationships are likely to create confidential relationships.[1315]

The court found that when there was a violation of a confidential relationship or of a fiduciary duty, as in this case, a constructive trust may be imposed.[1316]

Peterson also contended that the trial court's conclusion that Peterson and Magnuson collaborated to obtain Black's interest in the farmland was clearly erroneous.[1317] The evidence disclosed the following: 1) Peterson told Magnuson not to convey the land to Black, and Peterson did not tell Black he owned the land; 2) Peterson insisted that Black sign the papers that conveyed the land back to Magnuson; 3) Peterson told Black to sign the papers to convey and not to ask questions; and 4) Magnuson changed her will, leaving the land to Peterson soon after Black conveyed the land back to Magnuson.[1318] Based on these findings, the supreme court held that the trial court's finding of collusion was not clearly erroneous and affirmed the judgment.[1319]

1310. *Id.*
1311. *Id.*
1312. *Id.*
1313. *Black*, 442 N.W.2d at 429.
1314. *Id.* (citing *In re* Estate of Elmer, 210 N.W.2d 815 (N.D. 1973)).
1315. *Black*, 442 N.W.2d at 429. Black trusted both of them, and relied on their advice. *Id.* at 428.
1316. *Black*, 442 N.W.2d at 429. A trustee is required to have the highest of good faith and is not to profit from dealing with the property in trust. *Id.* (citing N.D. CENT. CODE §§ 59-01-09 and 59-01-10 (1987)).
1317. *Black*, 442 N.W.2d at 429.
1318. *Id.*
1319. *Id.* at 430.

THOMPSON V. BUFORD TP.

In *Thompson v. Buford Township*,[1320] a county judge, who was trustee of patent property, failed to consider the proper statutes in distributing the property and should have disqualified himself as judge since he had a conflict of interest.[1321] In 1906, a patent was issued to a Williams County judge to hold in trust for the benefit of occupants of the townsite of Buford, which was in Williams County.[1322] By virtue of his office of judge of the county court of Williams County, Gordon C. Thompson is the successor trustee.[1323]

Thompson filed a complaint against Buford Township to distribute the remaining property held in trust and oil and gas lease proceeds from the property.[1324] At a hearing on the complaint both Buford Township and Williams County appeared.[1325]

Thompson presided over the hearing and awarded all the mineral rights, bonuses, and one-half the royalty interest to Williams County.[1326] The other half of the royalty interest was awarded to Buford Township by Thompson, who gave great importance to the benefits received by Buford Township from Williams County.[1327]

Buford Township appealed to the North Dakota Supreme Court, arguing that the evidence did not support the trial court's decision and that the evidence indicated that the "spirit of the trust" would best be served by granting the trust property to Buford Township.[1328]

The court examined the statutory enactments by Congress and corresponding state legislature enactments concerning the terms and execution of trusts.[1329] The court looked at section 3042 of Article 21 of Chapter 32, Cities and Villages of the 1905 Revised

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1320. 445 N.W.2d 303 (N.D. 1989).

1321. Thompson v. Buford Tp., 445 N.W.2d 303, 306 (N.D. 1989).

1322. *Thompson*, 445 N.W.2d at 303. This patent was granted pursuant to statutes later codified as 43 U.S.C. § 711 et. seq. *Id.*

1323. *Id.*

1324. *Id.* This amounted to approximately $14,471. *Id.* at n.1.

1325. *Id.* at 304. Buford Township contended that it was entitled to the trust money because it would fulfill the spirit of the trust. *Id.*

1326. *Id.*

1327. *Thompson*, 445 N.W.2d at 304. The court cited the greater overhead of the county government. *Id.*

1328. *Id.* The township also argued that the judge should have disqualified himself since he was trustee. *Id.*

1329. *Id.* at 305. Chapter 135, enacted by the territory of Dakota in 1881, became a source of Article 21 of Chapter 32, City and Villages, of the 1905 revised code of North Dakota. *Thompson*, 445 N.W.2d at 305. *See* 43 U.S.C. § 718 (left defining the terms and execution of trusts to state legislature).

Code of North Dakota.[1330] This provided that the proceeds derived were to be placed in a general fund of the city, town, or village.[1331] The court deemed the statute a trust instrument, and noted that in construing a trust instrument, the objective is to determine the intent of the trustor.[1332]

The court determined that the intent of the legislature in enacting the statute was to benefit the local community.[1333] The court concluded that since there was no townsite to which the proceeds could be disbursed, the next most local unit of government should be the beneficiary in order to effectuate the intent of the trust.[1334]The court found that the trial court did not give due consideration to the intent of the legislature as provided in Article 21 of Chapter 31 of the 1905 code.[1335] The supreme court stated that on remand the trial court must determine which local unit of government could best carry out the intent of the trust for the local area.[1336] Since Thompson was a party in the proceedings, to avoid even an appearance of impropriety, the supreme court also concluded that the case be assigned to a different county judge.[1337] The supreme court reversed the judgment and remanded for further consideration.[1338]

UNEMPLOYMENT BENEFITS

LEE V. JOB SERVICE OF NORTH DAKOTA

In *Lee v. Job Service of N.D.*[1339] a full-time college student challenged a statute that disqualified full-time college students from receiving unemployment benefits.[1340] Pursuant to section 52-06-02(6) of the North Dakota Century Code, the North Dakota Job Service denied Kent Lee unemployment benefits, and a district court affirmed this decision.[1341] Lee appealed, alleging that

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1330. *Id.*
1331. *Id.*
1332. *Thompson*, 445 N.W.2d at 305.
1333. *Id.*
1334. *Id.* at 306.
1335. *Id.*
1336. *Id.*
1337. *Thompson*, 445 N.W.2d at 306-07. *See* N.D.R. JUD. CONDUCT 3(c)(1) (judge disqualification).
1338. *Thompson*, 445 N.W.2d at 304.
1339. 440 N.W.2d 518 (N.D. 1989).
1340. *Lee v. Job Service of N.D.*, 440 N.W.2d 518, 518 (N.D. 1989). *See* N.D. CENT. CODE § 52-06-02(6) (1987)(disqualifies individuals from unemployment benefits if they are full-time students). The 1989 legislature amended section 52-06-02(6) of the North Dakota Century Code to provide that unemployment benefits will be available to full-time employees who are also full-time college students. *Lee*, 440 N.W.2d at 518, n.1.
1341. *Lee*, 440 N.W.2d at 518.

the statute violated his constitutional guarantees of equal protection and due process.[1342]

The supreme court noted that it looks to three standards of review when considering an "equal protection" challenge to a statute: 1) strict scrutiny in cases involving "inherently suspect" classes and fundamental rights; 2) intermediate standard of review in cases involving an "important substantive right"; and 3) rational basis scrutiny in cases of economic and social matters.[1343] The North Dakota Supreme Court determined that unemployment benefits were not a substantive right, but "a matter of legislative grace."[1344] The court followed a United States Supreme Court case which held that unemployment benefits were within the social and economic areas and concluded it was appropriate to utilize the rational basis standard in reviewing the validity of the North Dakota unemployment benefits statute.[1345]

The North Dakota Supreme Court noted that with the rational basis standard of review, a statute would be upheld unless it had no rational relationship to a legitimate government interest.[1346] A few inequities do not deny equal protection.[1347]

The North Dakota Supreme Court found that the legislature could reasonably conclude that college students are not as available to work as those people who are not full-time students and, thus, not eligible for unemployment benefits.[1348] The court added that perhaps a full-time employee who is also a full-time college student deserves unemployment benefits, but that was for legislative determination.[1349]

Due process analysis is also satisfied by a classification that satisfies an equal protection analysis.[1350] The court also determined that the North Dakota Constitution was not violated.[1351]

Therefore, using the rational basis standard, the North Dakota

1342. *Id.* at 519. *See* N.D. CONST. art. I, § 21 (privilege and immunity cannot be granted to certain citizens); N.D. CONST. art. I, § 12 (no person shall be deprived property without due process); U.S. CONST. amend. XIV, § 1 (privileges and immunities, and equal protection clauses); U.S. CONST. amend V (due process clause).

1343. *Lee*, 440 N.W.2d at 519 (citing Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986)).

1344. *Lee*, 440 N.W.2d at 519.

1345. *Id.* (citing Idaho Dept. of Employment v. Smith, 434 U.S. 100, 101 (1977)).

1346. *Lee*, 440 N.W.2d at 519 (citing *Hanson*, 389 N.W.2d at 319).

1347. *Lee*, 440 N.W.2d at 520 (citing Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 491 (1977)).

1348. *Lee*, 440 N.W.2d at 520 (citing Shreve v. Dep't of Economic Security, 283 N.W.2d 506, 609 (Minn. 1979)).

1349. *Lee*, 440 N.W.2d at 520.

1350. *Lee*, 440 N.W.2d at 520 (citing Weinberger v. Salfi, 422 U.S. 749 (1975)).

1351. *Lee*, 440 N.W.2d at 520.

Supreme Court held that a state statute that disqualifies full-time college students from receiving unemployment benefits does not violate state and federal constitutional guarantees of equal protection and due process.[1352] The judgment was affirmed.[1353]

VALUATION

KBM, INC. V. MACKICHAN

In *KBM, Inc. v. MacKichan*[1354] one issue was whether the trial court used the proper accounting method to determine the value of stock.[1355] The second issue was whether the plaintiff shareholder was entitled to interest on the value of stock beyond the time the plaintiff rejected the defendant's offer.[1356]

Alan MacKichan was an employee and stockholder of KBM, Inc., a closely held engineering and architectural firm in Grand Forks.[1357] MacKichan tendered his resignation, and it was accepted by the board of directors on February 28, 1983.[1358] A stockholders' agreement required the stockholder, upon resignation, to first offer all of his or her stock to the corporation for "book value as of the end of the corporate fiscal year preceding the date of resignation."[1359] The corporation had sixty days to respond.[1360] The agreement also required the stockholder to offer remaining shares to other KBM stockholders for the same price and allow sixty days for response.[1361]

Unsold shares were then subject to an additional sixty-day period during which the corporation and the stockholder could negotiate an agreement "mutually satisfactory to all parties."[1362] If an agreement was still not reached, the corporation was to be liquidated with distribution of assets to stockholders.[1363] KBM and MacKichan agreed that the date for value determination was February 28, 1982, giving the stock a value of $100.28 per share.[1364]

MacKichan abided by the stockholders' agreement by offering his shares to the corporation and to individual shareholders before

1352. *Id.*
1353. *Id.*
1354. 438 N.W.2d 181 (N.D. 1989).
1355. KBM, Inc. v. MacKichan, 438 N.W.2d 181, 183 (N.D. 1989).
1356. *KBM, Inc.*, 438 N.W.2d at 184.
1357. *Id.* at 182.
1358. *Id.*
1359. *Id.*
1360. *KBM, Inc.*, 438 N.W.2d at 182.
1361. *Id.*
1362. *Id.*
1363. *Id.*
1364. *KBM, Inc.*, 438 N.W.2d at 182.

entering the 60-day negotiation period with the corporation.[1365] During this 60-day negotiation period, on August 17, 1983, KBM accepted MacKichan's offer made on February 28, 1983; however, MacKichan refused to sell for that price.[1366] KBM then brought suit against MacKichan, requesting the court to order the sale of the stock at the February 28, 1983, price of $100.28.[1367] MacKichan counterclaimed seeking liquidation of the corporation assets.[1368]

The trial court denied MacKichan's liquidation request and ordered MacKichan to sell his stock to KBM for $100.28 per share.[1369] On appeal, the North Dakota Supreme Court held that the trial court erred in requiring MacKichan to accept the "agreed upon book value" because it may result in unfair compensation.[1370] The case was remanded to formulate the proper damage remedy in "an amount the greater of: (1) the agreed-upon purchase price under the stockholders' agreement, which in this case is the book value of $100.28; or (2) the fair value of MacKichan's shares of KBM as of the effective date of MacKichan's resignation. . . ."[1371] The trial court determined that the proper approach to determine value was a net asset method, and because the net asset method resulted in an amount less than the agreed upon book value, the book value of $100.28 was set.[1372] The court ordered KBM to pay thirteen percent interest only from February 25, 1983, to August 17, 1983, opining that MacKichan could have taken his money on August 17, 1983, and avoided the cost of litigation.[1373] MacKichan appealed, claiming the court erred in determination of fair value and by not awarding interest beyond August 17, 1983.[1374]

The North Dakota Supreme Court held that the trial court did not err in the determination of value; however, the supreme court concluded that the lower court did err in not allowing interest

1365. *Id.* The corporation declined to purchase MacKichan's stock during the 60-day period. *Id.* The shareholders also refused to purchase. *Id.*

1366. *Id.*

1367. *Id.*

1368. *KBM, Inc.*, 438 N.W.2d at 182.

1369. *Id.*

1370. *Id.* at 182.

1371. *Id.* at 183. On remand, both parties presented testimony about the fair value of the stock, as prepared by certified public accountants, using the chase flow method, the retained earnings method, and the net asset method of accounting. *Id.*

1372. *KBM, Inc.*, 438 N.W.2d at 183. The trial court ordered KBM to pay $120.28 per share for MacKichan's 916 shares of stock. *Id.*

1373. *Id.*

1374. *Id.*

beyond August 17, 1983.[1375] In determining that the trial court had used the proper method for determining fair value, the supreme court indicated that "[d]eterminations of the value of property are questions of fact subject to the 'clearly erroneous' standard of Rule 52(a), N.D.R. Civ. P."[1376] The trial court heard various methods for fair value determination and did not strictly adhere to any of the expert opinions and thus, there was no clearly erroneous finding.[1377]

On the issue of interest the supreme court deferred to section 32-03-04 of the North Dakota Century Code which indicates that a person is entitled to interest on damages except when prevented by law or act of the creditor.[1378] MacKichan could rightfully reject KBM's belated offer to purchase, and the rejection cannot be construed as an "act which prevented KBM from paying the debt within the meaning of the statute."[1379] Therefore, MacKichan was entitled to interest beyond August 17, 1983, and thus, the trial court decision was affirmed in part and reversed in part.[1380]

VENDOR-PURCHASER

ANDERSON V. ANDERSON

In *Anderson v. Anderson*,[1381] plaintiffs appealed a judgment quieting defendants' title to one-fourth of 280 acres of farmland.[1382] Plaintiffs have record title to three-fourths of the 280 acres and claim the remaining one-quarter through adverse possession and through a deed from the original owner, Julia, to their grandfather dated February 7, 1934 and recorded December 14, 1983.[1383] The defendants, Julia's heirs, claimed the quarter through a quit claim deed from Julia dated October 1, 1951, and recorded October 11, 1951.[1384] The trial court rejected the adverse possession claim because Julia and her heirs had never

1375. *Id.* at 184-85.

1376. *Id.* at 183 (citing *Hesch v. Hesch*, 308 N.W.2d 390 (N.D. 1981); Amoco Oil Co. v. State Highway Dep't, 262 N.W.2d 726 (N.D. 1978)). *See* N.D.R. CIV. P. 52(a)(finding of fact shall not be set aside unless clearly erroneous).

1377. *KBM, Inc.*, 438 N.W.2d at 184.

1378. *Id.* at 184-85. *See* N.D. CENT. CODE § 32-03-04 (1987)(any person is entitled to interest on damages unless prevented by law or act of creditor).

1379. *KBM, Inc.*, 438 N.W.2d at 185.

1380. *Id.*

1381. 435 N.W.2d 687 (N.D. 1989).

1382. Anderson v. Anderson, 435 N.W.2d 687, 687-88 (N.D. 1989).

1383. *Anderson*, 435 N.W.2d at 688. Plaintiffs and their predecessors in interest have farmed the land since 1936. *Id.* They paid property taxes and satisfied the original mortgage. *Id.* Defendants have neither been in possession nor received rents or profits. *Id.*

1384. *Id.*

been ousted of their rights as cotenants.[1385] Further, it concluded that the recorded 1951 deed had priority over the unrecorded 1934 deed because the defendants' were purchasers in good faith for valuable consideration.[1386]

On appeal, the plaintiffs contended that the defendants were not good faith purchasers for valuable consideration.[1387] Defendants rely on their 1951 deed as presumptive evidence of consideration and note that the burden of proving lack of consideration falls on the party seeking to invalidate the deed.[1388]

To qualify for protection under a recording act the purchase must generally be for valuable and not nominal consideration.[1389] The rationale for this requirement is to protect purchasers "who honestly believe they are acquiring good title" and who invest a substantial amount in that belief.[1390]

A written deed is not always presumptive evidence of valid consideration especially when, as in this case, the grantor has already executed a valid deed to the same estate.[1391] Recital of nominal consideration is insufficient to establish a presumption of value.[1392] Further, the good faith purchaser has the burden of proving that valuable consideration was given using evidence other than the deed.[1393] There was no evidence of any actual consideration in this case.[1394]

The court concluded that the recited consideration was nomi-

1385. *Id.*

1386. *Id.* Section 47-19-41 of the North Dakota Century Code provides in relevant part:

> Every conveyance of real estate not recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, . . . first is deposited with the proper officer for record and subsequently recorded, whether entitled to record or not, . . . prior to the recording of such conveyance.

N.D. CENT. CODE § 47-19-41 (1978 and Supp. 1989).

1387. *Anderson*, 435 N.W.2d at 688.

1388. *Id.* Defendants rely on section 9-05-10 of the North Dakota Century Code, providing that "a written instrument is presumptive evidence of a consideration" and section 9-05-11 which states that "[t]he burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." N.D. CENT. CODE §§ 9-05-10, 9-05-11 (1987 & Supp. 1989).

1389. *Anderson*, 435 N.W.2d at 689 (citing 6A Powell on Real Property § 905[2] (1988)). *See* cases cited in United States v. Certain Parcels of Land, 85 F. Supp. 986, 1006 n.17 (S.D. Cal. 1949).

1390. *Anderson*, 435 N.W.2d at 689 (quoting from Harton v. Kyburz, 53 Cal. 2d 59, __, 346 P.2d 399, 403 (1959)).

1391. *Anderson*, 435 N.W.2d at 689 (citing *Certain Parcels of Land*, 85 F. Supp. at 1001, quoting President and Presiding Elder of Southern Cal. Conference on Seventh Day Adventist v. Goodwin, 119 Cal.App. 37, 39, 5 P.2d 973, 974 (1931)).

1392. *Anderson*, 435 N.W.2d at 689. *E.g.*, *Certain Parcels of Land*, 85 F. Supp. at 1001.

1393. *Anderson*, 435 N.W.2d at 689 (citing 8 Thompson on Real Property § 4316 (1963)).

1394. *Anderson*, 435 N.W.2d at 690.

nal, and thus, defendants were not good faith purchasers; judgment was reversed and remanded for entry of judgment quieting title in the plaintiff.[1395]

WORKER'S COMPENSATION

CHOUKALOS V. NORTH DAKOTA WORKERS' COMPENSATION BUREAU

In *Choukalos v. N.D. Worker's Compensation Bureau*,[1396] Richard Choukalos appealed an affirmation by the district court of the North Dakota Workers' Compensation Bureau's denial of his claim for benefits.[1397] Choukalos became mentally impaired following termination from employment by the North Dakota Insurance Department.[1398] The issue on appeal was whether mental injury resulting from employment termination is compensable under the workers' compensation statutes.[1399]

The North Dakota Supreme Court reasoned that workers' compensation statutes were enacted to protect workers from the hazards of employment.[1400] Absent a clear legislative statement, the statute can not be construed as offering protection from the hazards of termination.[1401] An employee can pursue remedies other than workers' compensation for injury resulting from termination. The decision of the district court was affirmed.[1402]

HAYDEN V. N.D. WORKERS COMP. BUREAU

In *Hayden v. N.D. Workers Comp. Bureau*,[1403] the Workers Compensation Bureau was held to have the authority to determine a violation of the false claims act and a worker was found to

1395. *Id.* Justice VandeWalle concurred, noting that the plaintiffs should prevail on the basis of their claim of adverse possession. *Id.* (VandeWalle, J., concurring).

1396. 427 N.W.2d 344 (N.D. 1988).

1397. Choukalos v. N.D. Workers' Compensation Bureau, 427 N.W.2d 344, 345 (N.D. 1988).

1398. *Choukalos*, 427 N.W.2d at 345. The Bureau did not dispute that termination caused an "acute onset or flare-up of his underlying psychiatric condition." *Id.*

1399. *Id.*

1400. *Id.* at 346. *See* N.D. CENT. CODE § 65-01-02(7) (1985) and § 65-01-02(8)(Supp. 1989)(defining a compensable injury as "an injury by accident arising out of and in the course of employment"). "Arising out of" language is " 'construed to refer to causal origin' " and " 'course of employment' " language refers to " 'time, place, and circumstances of the accident in relation to the employment' " (quoting 1 A. LARSON, LARSON'S WORKMENS' COMPENSATION LAW § 6.10, at p. 303 (1985)). *Choukalos*, 427 N.W.2d at 346.

1401. *Choukalos*, 427 N.W.2d at 346. *See* Smith and Sanders, Inc., v. Peery, 473 So. 2d 423 (Miss. 1985); Georgia-Pacific Corp. v. Workers' Compensation Appeals Bd., 144 Cal. App. 3d 72, 192 Cal. Rptr. 643 (1983).

1402. *Choukalos*, 427 N.W.2d at 346.

1403. 447 N.W.2d 489 (N.D. 1989).

have violated the false claims statute by accepting benefits while working.[1404]

While employed by a drilling corporation, Douglas R. Hayden was injured in a work related accident.[1405] The Workers Compensation Bureau determined that Hayden was temporarily permanently disabled and awarded Hayden benefits.[1406] The Bureau discontinued the benefits after it found out that Hayden was employed on a full time basis driving a beet truck and received $600 in total disability benefits during that period.[1407] Hayden requested a hearing and after the hearing the Bureau issued an order denying any more disability benefits and ordered Hayden to pay the amount of benefits received during the period he was working.[1408] Hayden appealed the order to the District Court for McKenzie County which affirmed the Bureau's decision.[1409] Hayden appealed the district court decision to the North Dakota Supreme Court.[1410]

The supreme court first considered whether or not it had the jurisdiction to hear Hayden's appeal.[1411] Hayden initially filed his appeal in Williams County and the Bureau filed a motion to dismiss because section 65-10-01 of the North Dakota Century Code provides that appeals must be filed in "the district court of the county wherein the injury was inflicted or of the county in which the claimant resides."[1412] Since Hayden resided in Montana, the proper place to file an appeal from the Bureau's decision was McKenzie County, the place of the injury.[1413] The district court of Williams County allowed Hayden to change the venue of the appeal.[1414] The supreme court did not agree with the Bureau's contention that the district court could not transfer the case, determining that the supreme court could allow such a transfer if it deemed it proper.[1415]

1404. Hayden v. N.D. Workers Comp. Bureau, 447 N.W.2d 489, 495-96 (N.D. 1989).

1405. *Hayden*, 447 N.W.2d at 490. Hayden was a motorman on a drilling rig and his injury occurred while working on a rig in McKenzie County. *Id.*

1406. *Id.*

1407. *Id.* at 490-91.

1408. *Id.* at 491.

1409. *Id.*

1410. *Id.* The supreme court determined whether or not a "reasoning mind could reasonably have determined that the factual conclusions were supported by the weight of the evidence." *Id.* (citing Power Fuels, Inc. v. Elkin, 283 N.W.2d 214 (N.D. 1979)).

1411. *Hayden*, 447 N.W.2d at 492.

1412. *Id. See* N.D. CENT. CODE § 65-10-01 (1987)(claimant may appeal to the district court either where injury was inflicted or county of residence).

1413. *Hayden*, 447 N.W.2d at 492.

1414. *Id.*

1415. *Id.* at 493. The Bureau contended that section 27-02-05.1 of the North Dakota Century Code only authorized the power to transfer venue with the supreme court. *Id.*

The supreme court next considered whether or not the Bureau had the authority to find Hayden in violation of the false claims statute.[1416] The statute makes a violation a misdemeanor and provides for administrative sanctions.[1417] The supreme court found that the Bureau had the authority to enforce regulations for administering the provisions of Workers Compensation laws.[1418]

Thirdly, the supreme court determined whether or not Hayden "returned to work" as defined in the false claim statute.[1419] Hayden asserted that he did not return to work because it was temporary work and that he suffered pain while working.[1420] The court examined legislative history and concluded that the intent was to impose a penalty for anyone who "accepts disability benefits for a period during which that person is actually working."[1421] The supreme court concluded that Hayden was actually working during the period for which he accepted the disability benefits.[1422]

Finally, the court decided whether Hayden met his burden of proving his continued disability.[1423] Although there was conflicting evidence, the supreme court concluded that the Bureau's finding that Hayden was not disabled was supported by the preponderance of the evidence.[1424] The court found that the Bureau properly addressed the conflicting evidence.[1425]

The judgment denying benefits and ordering Hayden to reimburse the Bureau was affirmed.[1426]

The supreme court noted that section 28-04-07 of the North Dakota Century Code provided that the trial court may change the place of trial. *Id.* at 494. *See* N.D. CENT. CODE § 27-02-05.1 (Supp. 1989)(administrative supervision by the supreme court); N.D. CENT. CODE § 24-04-07 (1974)(change of venue).

1416. *Hayden*, 447 N.W.2d at 494. *See* N.D. CENT. CODE § 65-05-33 (1987)(a claimant filing false claim, false statements or accepts disability benefits after the claimant has returned to work shall reimburse the Bureau and is guilty of a misdemeanor).

1417. *Hayden*, 447 N.W.2d at 494.

1418. *Id.* at 495.

1419. *Id.* Hayden had completed his GED and an Emergency Medical Technician course. *Id.* Hayden drove a beet truck and was employed as a surveyor and a bartender. *Id.* Hayden did not report any of this employment to the Bureau. *Id. See* N.D. CENT. CODE § 65-05-33, *supra* note 1416.

1420. *Hayden*, 447 N.W.2d at 495. Hayden introduced the "odd lot" doctrine which the court declined to accept. *Id.* Under the "odd lot" doctrine, disability may be found if a worker is so limited in his capacity for work that he could not be employed on a regular basis. *Id.*

1421. *Hayden*, 447 N.W.2d at 496.

1422. *Id.*

1423. *Id.*

1424. *Id.*

1425. *Id.* at 498. The court determined that even if the state had accepted the "odd lot" doctrine, Hayden wouldn't qualify because he did not prove an obvious physical impairment. *Id.*

1426. *Hayden*, 447 N.W.2d at 498. Justice Meschke concurred noting that the court preferred disposing of cases on their merits and that the court fairly applied the rule when determining jurisdiction. *Id.* Justice VandeWalle also concurred in the last three parts of

WALD V. CITY OF GRAFTON

In *Wald v. City of Grafton*[1427] the sole issue was whether a claim under the worker's compensation statute bars claim for loss of consortium.[1428] In October of 1985, Cynthia Wald's husband was seriously injured while on the job.[1429] He subsequently filed for and received worker's compensation benefits.[1430] Cynthia then sued her husband's employer (the City of Grafton) for loss of consortium.[1431] The trial court granted summary judgment for the city because of the exclusive-remedy provision of the workers compensation statute.[1432]

The supreme court looked to North Dakota Century Code sections 65-01-01 and 65-05-06 and found that they barred Cynthia Wald's action for loss of consortium.[1433] Cynthia Wald contended that she, herself, did not receive benefits, hence she should not be precluded from suing.[1434] The supreme court disagreed and followed the precedence of other states that did not allow loss of consortium claims that had similar exclusive-remedy statutes.[1435] The court also refused to follow the "Massachusetts rule" that allows recovery for loss of consortium.[1436] The court noted that the Massachusetts statute was much more narrowly drawn, and thus was much different from North Dakota's broad workers compensation statute.[1437]

In *Hastings v. James River Aerie No. 2337, etc.*,[1438] the North Dakota Supreme Court had decided that "a right of consortium is property under Section 5-01-06, N.D.C.C."[1439] Wald reasoned

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the opinion and would have concurred in the first if jurisdiction was a matter of equity. *Id.* Justice VandeWalle concurred because the result was the same whether or not the court had jurisdiction. *Id.* at 499-500. Justice Levine dissented, stating that the majority "improperly blended two very different concepts: jurisdiction and venue." *Id.* at 500 (Levine, J., dissenting).

1427. 442 N.W.2d 910 (N.D. 1989).

1428. Wald v. City of Grafton, 442 N.W.2d 910, 911 (N.D. 1989).

1429. *Wald*, 442 N.W.2d at 910.

1430. *Id.*

1431. *Id.* at 910-11.

1432. *Id.* at 911.

1433. *Id. See* N.D. CENT. CODE §§ 65-01-01 (1985 & Supp. 1989)(provides worker's compensation benefits for the "exclusion of every other remedy"); 65-05-06 (1985 & Supp. 1989)(exclusion of other relief upon receipt of worker's compensation benefits).

1434. *Wald*, 442 N.W.2d at 911.

1435. *Id.* The court looked to the treatise by Professor Larson that discussed the exclusive remedy provisions of worker compensation acts. *Id. See* 2A LARSON WORKMEN'S COMPENSATION LAW § 65.11 (1988).

1436. *Wald*, 442 N.W.2d at 911-12.

1437. *Id.* at 912.

1438. 246 N.W.2d 747 (N.D. 1976).

1439. *Wald*, 442 N.W.2d at 912 (citing Hastings v. James River Aerie No. 2337, Etc. 246 N.W.2d 747 (N.D. 1976)).

that since the court held consortium was property, her claim was for property and not personal injuries, thus not barred by the worker's compensation statute.[1440] The court distinguished *Hastings* on the grounds that it was a dramshop case and the "statute involved employed words that had certain meaning at common law."[1441] The law of consortium involves more than property rights between a husband and wife.[1442] For this reason loss of consortium could not be "neatly categorized as a 'property' right."[1443] The court then stated that any changes in the Workers Compensation Act is for the legislature.[1444] Therefore, the decision of the trial court was affirmed.[1445]

1440. *Wald*, 442 N.W.2d at 912.
1441. *Id.*
1442. *Id.*
1443. *Id.*
1444. *Id.*
1445. *Id.* Justice Levine stressed in her concurring opinion that the limits placed on injured workers under the worker's compensation law similarly limit the injured worker's spouse. *Id.* at 913 (Levine, J., specially concurring). Levine also stated that because marriage is an "economic partnership," an injured person's worker's compensation benefits inure to the benefit of the person's spouse. *Id.*